TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 365

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

vs.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

(36,179)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 365.

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX

	Original	Print
Proceedings in Supreme Court of Missouri	1 a	1
Caption (omitted in printing)	1 a	
Record from Circuit Court of Jackson County	1 a	1
Caption (omitted in printing)		
Verdict and Judgment	1 a	1
Order Allowing Appeal	1 b	2
Clerk's Certificate (omitted in printing)	1 c	
Appellant's Abstract of Record	1	3
Petition	2	4
Answer	6	6
Record Entries	6	6
Bill of Exceptions	9	9

	Original	Print
Testimony of R. S. Mitchell	9	9
W. H. Boulit	31	33
George A. Lock	58	60
Albert Clark Gladson	59	61
Transcript of Former Testimony	86	88
Lawrence F. Hayes	115	117
Transcript of Former Testimony	162	164
Ada Riley	168	170
Sophia David	170	172
Defendant's Demurrer to the Evidence (Denied)	176	178
Testimony of L. Q. Moore	176	178
H. M. Dougherty	184	186
C. M. Barber	190	192
Defendant's Peremptory Instruction Refused	200	202
Plaintiff's Requested Instructions Given to Jury	202	204
Defendant's Requested Instructions Given to Jury	204	206
Defendant's Requested Instructions Given as Modified	205	207
Court's Instructions to Jury	207	209
Defendant's Requested Instructions Refused	209	211
Verdict	210	212
Motion for New Trial	211	213
Order Overruling Motion for New Trial	214	216
Order Settling Bill of Exceptions	216	218
Submission of Cause in Supreme Court	219	219
Judgment of Affirmance	219	219
Opinion, Ragland, J	220	219
Motion for Rehearing (omitted in printing)	234	
Motion to Transfer to Court in Banc (omitted in printing)	238	
Suggestions in Opposition to Motions for Rehearing and to Transfer to Court in Banc (omitted in printing)	240	
Order Denying Motions for Rehearing and to Transfer to Court in Banc	245	234
Clerk's Certificate (omitted in printing)	246	
Order allowing certiorari		235

[fol. 1-a] [Caption omitted]
[fols. 1-a and 1-b]

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI.

No. 209164.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Defendant.

VERDICT AND JUDGMENT—May 31, 1928.

Again come the parties and the jury herein, and the hearing of the evidence is concluded and the said jury after being instructed by the Court and hearing the arguments of counsel for the respective parties retire for consideration of its verdict and after due deliberation, the said jury returns its verdict into open court which said verdict is in words and figures as follows, to-wit:

> "We the jury, find the issues for the plaintiff and do assess her damages at fifteen thousand dollars [$15,000.00].
>
> Stanley S. Stone,
> Foreman."

Wherefore, it is ordered and adjudged by the Court that plaintiff have and recover from the defendant the sum of fifteen thousand dollars [$15,000.00] with interest thereon from this day at the rate of six

per cent per annum together with the costs of the cause and that execution issue therefor.

[fol. 1-b]

IN THE CIRCUIT COURT OF JACKSON COUNTY.

[Title omitted]

ORDER ALLOWING APPEAL—July 7, 1928.

Defendant presents and files application and affidavit for an appeal from the judgment of this Court in this cause. Which said application is by the Court sustained and appeal allowed to the Supreme Court of Missouri.

Appeal bond fixed at the penal sum of [$31,000.00].

Defendant is given leave to file bill of exceptions until on or before the last day of the September, 1928 term of this Court. And now defendant presents and files its appeal bond herein in the penal sum of [$31,000.00] with Arthur J. Elliott and A. Newman as sureties thereon which said bond is by the Court approved.

Clerk's certificate to foregoing papers omitted in printing.

No. 29330.

IN THE

SUPREME COURT OF MISSOURI

DIVISION No. I.

APRIL TERM, 1930.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT,

VS.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT.

APPEAL FROM CIRCUIT COURT OF JACKSON COUNTY, MISSOURI.

HONORABLE RALPH S. LATSHAW, JUDGE, DIVISION EIGHT.

APPELLANT'S ABSTRACT OF RECORD.

This suit was instituted in the Circuit Court of Jackson County, Missouri, at Kansas City, on November 3, 1924, by the filing of plaintiff's

petition; plaintiff thereafter and on January 21, 1927, filed her amended petition, on which the case was tried, as follows (caption and signature omitted):

Amended Petition.

Plaintiff for her cause of action states:

(1) James Lee David died on the 17th day of May, 1923, and thereafter plaintiff was by the Probate Court of Jackson County, State of Missouri, appointed administratrix of said David's estate; plaintiff has duly qualified as such administratrix and is now acting as such.

(2) The above named defendant at all times herein mentioned is and was a corporation and common carrier by railroad, engaged in commerce between the several states of the United States.

(3) Said David, while employed by the defendant in commerce between the several states of the United States, did at about 1:30 o'clock A. M., on May 17, 1923, suffer bodily injury, which injury on the same day caused said David's death, and plaintiff now brings this action to recover damages therefor, under the laws of the United States, being Act of Congress of April 22, 1908, 35 United States Statutes at Large, 65, as amended by Act of Congress, approved April 5, 1910, 35 Statutes at Large 291, and all other Acts of Congress dealing with the premises.

(4) Said injury was sustained by said David while said David was in the employ of the defendant as aforesaid, and resulted in whole or in part from the carelessness and negligence of the

defendant, its officers, agents and employees in this, to-wit:

That on said 17th day of May, 1923, and for a long time prior thereto the said James Lee David was employed by the defendant in connection with its commerce business between the several states of the United States as a train rider, whose duty it was to ride upon the trains of the defendant for the purpose of protecting its property and the property carried by it from damage and loss, and in general to watch over and guard the trains and property carried upon the trains of the defendant while in transit; that said David was assigned the duty by the defendant of riding its trains between the city of Kansas City in the State of Missouri, and the city of Atchison in the State of Kansas; that at some time prior to said 17th day of May, 1923, the defendant in its special agents or police department, negligently and wantonly employed a certain person as an informant who was known by the defendant at said time to be an ex-convict, a thief and robber, who consorted with thieves, robbers, murderers and other desperate persons, and the defendant instructed said informant to continue to consort with thieves, robbers, murderers and persons of desperate character and to learn of their plans and designs, especially with reference to theft or robbery of property of defendant or in its possession, and further instructed said informant that whenever he should learn of any proposed robbery or theft of or from the defendant, that said informant should report such fact to the defendant to the end that such

thieves or robbers might be interrupted and apprehended; that said informant entered upon said employment and was regularly paid by the defendant therefor; that at some time before the 17th day of May, 1923, the said informant, then in the employ of defendant, pursuant to his employment as aforesaid, consorted with certain desperate persons known to said informant to be thieves, robbers and murderers, and said persons informed said informant that they intended to rob a certain train of the defendant at Leavenworth, Kansas, in the early morning of said May 17, 1923; that said informant, the agent of defendant, accompanied said thieves and robbers to said Leavenworth, Kansas, well knowing the design and intent of said persons, and knowing that they were armed with firearms, and knowing that they were of such desperate character that they would take human life in order to accomplish their purpose or to protect themselves if interfered with, and knowing that train riders and train crew upon said train would be subjected to the hazard of an encounter with said desperate persons, and said informant went with said persons and said informant remained until the arrival of said certain train of the defendant, and upon the arrival of said train, said persons in the presence of said informant surrounded said train with intent to rob the same; that said train had come to said Leavenworth, Kansas, from Kansas City, Missouri, laden with goods in interstate commerce, and said James Lee David was riding said train between said Kansas City, Missouri, and Leavenworth, Kansas, as a train rider

in accordance with instructions given him by defendant, and in the performance of his duties as the employee of the defendant as aforesaid, and without any knowledge or warning of said contemplated robbery; that said thieves and robbers, while attempting to carry out their design to rob said train, saw said David upon said train and did then and there with a firearm shoot and kill said David in the early morning of said May 17, 1923; that said defendant through its agents and employees knew of said contemplated robbery in time, by the exercise of ordinary care, to have frustrated and prevented the same and to have afforded protection to said James Lee David and to have warned said James Lee David of said proposed robbery so that said James Lee David could have protected himself, but said defendant negligently and carelessly failed so to do, and as a result thereof said James Lee David was shot and killed as aforesaid.

(5) Said David was a married man at the time of his death and left surviving him, his widow, Sophia David, wholly dependent on him for her support, and two children, partly dependent on him for support.

(6) At the time of his death said David was a strong, able-bodied man, forty-two years of age, sober and industrious, earning and capable of earning a good livelihood for himself and his family; that the said Sophia David and her children derived pecuniary benefits from his labor, and his wrongful death deprived them of pecuniary benefits which they were then receiving and had reasonable expectation of receiving in the future.

Wherefore, plaintiff, for the benefit of said widow and children, prays damages in the sum of Sixty Thousand ($60,000.00) Dollars, together with her costs in this behalf expended.

To this amended petition, defendant, on the 19th day of February, 1927, filed its answer which (omitting caption and signature) was as follows:

Answer to Amended Petition.

Now comes the defendant, and for answer to the plaintiff's amended petition herein denies each and every allegation therein contained.

Further answering said petition, defendant avers that the deceased, James Lee David, at and prior to his fatal injury was familiar with and voluntarily assumed all the risk of any and all hazards and dangers which in anywise caused or contributed to his fatal injury.

Wherefore, defendant asks to be discharged with its costs.

To this answer plaintiff filed her reply consisting of a general denial.

Abstract of Record Entries.

This case was duly assigned for trial to Division No. 8 and came on for trial on the 18th day of June, 1928, same being the 30th day of the regular May, 1928, Term of the Circuit Court of Jackson County, Missouri, at Kansas City before the Honorable Ralph S. Latshaw, Judge of said Division No. 8, and resulting on the 19th day of June, 1928, same being the 31st day of the regular May, 1928, term

of said court, in a verdict for the plaintiff and against the defendant for $15,000.00 upon which verdict judgment was on said day rendered.

Afterwards, to-wit: on the 20th day of June, 1928, same being the 32nd day of the regular May, 1928 Term of said court, and within 4 days after the rendition of the verdict and the judgment thereon, the defendant filed in said cause its motion for a new trial and its motion in arrest of judgment as shown by the following record entry in said cause:

"Now on this day defendant Missouri Pacific Railroad Company, files motion for a new trial in this cause."

"Now on this day defendant, Missouri Pacific Railroad Company, files motion in arrest of the judgment in this cause."

Afterwards, to-wit: on the 30th day of June, 1928, same being the 41st day of the regular May, 1928, term of said court, the court overruled the defendant's motion for a new trial of this cause and defendant's motion in arrest of judgment as shown by the following record entry in said cause:

"Now, the motion by defendant for a new trial of this cause is by the court overruled, to which action and ruling of the court the defendant excepts."

"Now, the motion of defendant in arrest of judgment in this cause is by the court overruled, to which action and ruling of the court defendant excepts."

Afterwards, to-wit: on July 7, 1928, same being the 46th day of the regular May, 1928 term of said court, and during the same term in which defendant's motion for new trial and motion in arrest of judgment was overruled and excepted to, de-

fendant presented and filed its application and affidavit for an appeal from the judgment of said court in said cause; said application was on said day by the said court sustained and its appeal duly allowed to the Supreme Court of Missouri and its appeal to this court was duly taken.

On the same day leave was by said court granted defendant to file an appeal bond in the sum of $31,000.00 which appeal bond was by said defendant on said day filed and presented, and by the court duly approved.

On said day the defendant was granted leave to file its bill of exceptions in this cause on or before the last day of the regular September, 1928, Term of this court and that said time was thereafter duly extended by said court to the last day of the November, 1928, term of said court.

Thereafter, and within the time duly allowed by the said court for the filing of said bill of exceptions, the said bill of exceptions was duly signed and filed and made a part of the record in this cause, which said bill of exceptions so signed and so filed is (omitting caption) as follows, to-wit:

BILL OF EXCEPTIONS ON BEHALF OF DEFENDANT.

Be it remembered, that on the 18th day of June, 1928, the same being the 30th day of the regular May Term, 1928, of said Circuit Court, this cause coming to be heard before the Honorable Ralph S. Latshaw, Judge of said court and a jury duly empaneled, the plaintiff appearing by McVey and Freet, and the defendant appearing by its attorneys Hackney & Welch, by Mr. Hackney representing said firm, whereupon, the following proceedings were had and entered of record on said day and the days hereinafter mentioned, to-wit:

Mr. Freet: If the court pleases, it is admitted between plaintiff and defendant that at the time of his death Mr. David was engaged in interstate commerce, the train upon which he was employed was engaged in interstate commerce, and that this is a suit under the Federal Employees Liability Act. I will now introduce in evidence the deposition of R. S. Mitchell. The original is missing from the court files and Mr. Hackney and I have an agreement that this may be used with like force and effect as the original; that each of us have a carbon copy.

Admitted in evidence.

The same is here marked Plaintiff's Exhibit 1 as follows:

Deposition—R. S. Mitchell.

Direct Examination by Mr. Boisseau.

Q. State your name? A. R. S. Mitchell.

Q. Where do you live, Mr. Mitchell? A. St. Louis.

Q. How long have you lived in the City of St. Louis? A. Since 1903.

Q. What is your occupation? A. I am a railroad official.

Q. With what railroad? A. Missouri Pacific Railroad.

Q. How long have you been employed by the Missouri Pacific? A. Since 1912.

Q. And in what capacity are you now employed? A. Chief special agent.

Q. How long have you held that position? A. Since 1912.

Q. What are your duties as chief special agent? A. They are too numerous to detail.

Q. Does that include doing police work and having charge of the— A. It includes the supervision of police work.

Q. The supervision of police work? A. Yes, sir.

Q. Of course, you don't actually do that sort of work yourself, but you have charge of that department of the railroad? A. Yes, sir.

Q. That includes what? A. I believe you have defined it as police work; I think that covers the ground.

Q. Can you tell us in a general way what that is? A. Police work means protection of the property of the railroad and of the property entrusted to the railroad.

Q. Are you the head of that department for the entire Missouri Pacific System? A. Yes, sir.

Q. Now in that capacity, is it part of your duties to employ men who are to protect the property belonging to the Missouri Pacific Rail-

road and being handled in their freight trains and other trains? A. You mean, to personally employ them?

Q. Yes. A. No, sir.

Q. Do men in your department, working under your direction, employ persons—such persons as you have described? A. Yes, sir.

Q. Just what do you, personally, have to do with reference to that? A. I supervise the service; in order that you may understand the organization, and also understand that I am not trying to evade anything, I want to give you all the information that you want—

Q. I understand. A. Our special service is divided into a great many units, a great many heads; as an illustration, we have sixteen divisions on our system; there are sixteen special service heads under my direction, scattered all over the railroad; each divison having a special service representative or special agent. Now, all of the men entering the service under a special agent are employed at various special service headquarters. I take it you want to know as to the employment of men in Kansas City?

Q. I will get to that, yes? A. Cut that out, then, please.

Q. Mr. Mitchell, you say there are sixteen special agents working under you? A. Yes, sir.

Q. Now, do those men have charge of a different character of service, or just different territory? A. Different territory.

Q. Different territory? A. Yes, sir.

Q. Who is the special agent at Kansas City? A. Mr. J. H. Baehr.

Q. He is the gentleman who used to be here in St. Louis, I believe? A. Yes.

Q. Is there a special agent in Kansas City by the name of Boult? A. No, sir, there is an assistant chief special agent in Kansas City named Boult; he is my assistant there.

Q. That is Mr. W. H. Boult? A. Yes, sir. Further explaining my organization, I have two assistant chief special agents, one located at Kansas City, and the other located at Little Rock.

Q. Your chief special agent at Kansas City is Mr. Baehr? A. No, my assistant chief special agent at Kansas City is Mr. Boult; my special agent at Kansas City is Mr. Baehr.

Q. Then the man who is at the head of this service at Kansas City, directly under you, is the assistant chief special agent, Mr. Baehr? A. No, sir. Mr. Baehr is the special agent at Kansas City; here is the head of the service (illustrating); for the purpose of administration, we split the system in two, then we have an assistant chief at Kansas City and an assistant chief at Little Rock; now, the division special agents are—he keeps in touch immediately with the division special agents; the division special agent at Kansas City is Mr. Baehr.

Q. He has charge of all the men at Kansas City? A. Yes, sir.

Q. And all of your assistant agents or employes in that department at Kansas City are under Mr. Baehr? A. Yes, sir.

Q. Now, Mr. W. H. Boult is one of those? A. No, Mr. W. H. Boult is superior to Mr. Baehr.

By Mr. Hackney: He is assistant chief.

By the Witness (illustrating): This is my office, St. Louis; here is Mr. Boult at Kansas City; he is colonel or a major, he is a major in the organization; the other gets down to a captain.

Q. I probably had Mr. Boult and Mr. Baehr twisted? A. I believe you had them twisted, yes.

Q. Is Mr. Boult the man that is in charge of the men in Kansas City, in the Kansas City office? A. That is, he is in charge of the Kansas City office, like he is all the western offices. Now, the man immediately in charge of the Kansas City office is Mr. Baehr, but he has supervision over Mr. Baehr.

Q. How long has Mr. Boult occupied that position? A. I think since about 1913.

Q. At any rate, you are sure he occupied that position throughout the year 1923? A. Yes, sir.

Q. And since that time? A. Yes, sir.

Q. Now, Mr. Mitchell, are you acquainted with a man by the name of Harry McCarthy? A. Yes, sir.

Q. Is he now employed by the Missouri Pacific Railroad Company, in your department? A. No, sir.

Q. Was he ever employed in that department? A. Not as a member of the department, no.

Q. Was he ever employed as an employee of the railroad company, at all, by you or by anyone working under you? Yes.

Q. Who employed him? A. I did.

Q. And when did you employ him? A. Oh, in April, 1923, I think it was.

Q. Do you know about the time; was it the 3rd or 5th— A. I think it was the 5th.

Q. The 5th day of April, 1923? A. That is my recollection.

Q. Where was he employed? A. Kansas City.

Q. You personally saw him in Kansas City? A. On that date, yes.

Q. Where did you see him there? A. Hotel Baltimore.

Q. Had you known him before that time? A. No, sir, I met him on that day.

Q. Met him that day? A. Yes, sir.

Q. How did you happen to meet him? A. I met him through some acquaintances, they brought him to me.

Q. And in what capacity did you employ him? A. As McCarthy; he was a thief at that time.

Q. You didn't employ him for that purpose? A. I employed him as an informant.

Q. You say he was a thief at that time? A. Yes, sir.

Q. What is your information—what information have you about that?

By Mr. Hackney: Just state how the matter came to you, Mr. Mitchell?

By the Witness: In order that you may understand this employment thoroughly, the Missouri Pacific Railroad was being harassed, annoyed and robbed by what we term an organized gang of thieves, in and adjacent to Kansas City; I was personally very much concerned about our losses, and in a meeting of chief special agents somewhere—I don't know where that was—I told my

troubles to these gentlemen, and one of those men was Mr. Gale, chief special agent of the Union Pacific Railroad. Shortly after this conference that I refer to, which may have been in Chicago—I don't know where—I received a letter from Mr. Gale, saying he was advised by his Mr. White, his division special agent at Kansas City, that a man named McCarthy, a member of this gang of thieves, would, for a consideration, be an informant or snitch, as it is usually called in the thief parlance, and assist us in catching this gang of thieves robbing us in that territory. I then, of course, thanked Mr. Gale for his information, and arranged with him to meet his Mr. White in Kansas City, and through Mr. White, to meet Mr. McCarthy. I went to Kansas City, to the Baltimore Hotel, at a later date and 'phoned Mr. White, who brought McCarthy to my room. I talked with McCarthy probably two or three hours, at which time he told me the history of the robberies committed by this gang; he told me at that time who was acting as head of the gang, who was furnishing the brains for these thieves, and he told me a great many details in connection with these robberies; he told me that he was trailing with the gang and he wanted to get away from them. I arranged with him to keep us informed as to the activities of this gang, to give us advance information, if possible, when this gang planned to rob our trains, and further arranged with him, in the event he could not get to us, couldn't give us advance information, to give us information then as to the fence where the stuff was taken, as well as who was in the robbery, and all the details pos-

sible. Now, after I had satisfied myself that McCarthy knew what he was talking about, and I believed he could do what he contracted to do, I arranged with him to pay him one hundred and fifty dollars a month for that sort of service, and then I called in my assistant, Mr. W. H. Boult, and I introduced Boult to McCarthy, and arranged with McCarthy his way of reporting to Mr. Boult, and left the matter in Mr. Boult's hands.

Q. McCarthy was to report to Mr. Boult? A. Yes, sir.

Q. He wasn't to report to you? A. Oh, he never did report to me any details after that.

Q. In other words, did he meet anyone in the Kansas City office besides Mr. Boult? A. No, no, he never went to the Kansas City office, as far as I know; this was a hotel transaction; then my understanding is, he reported to Mr. Boult by 'phone; that was the arrangement made at that time, and if it was necessary to arrange a meeting, he was to arrange a meeting by 'phone.

Q. He knew how to get hold of Mr. Boult? A. Yes, night and day service.

Q. And where he could reach Mr. Boult at any time if he might want him? A. Yes, sir.

Q. Did you know who the thieves were with whom he was supposed to be associating? A. He told me all of their names at that time.

Q. Who were they? A. I don't remember all of them; one was named Loar, one was Gadsden—

By Mr. Hackney: I think it is Gladsten; Hayes.

By the Witness: Yes, Hayes; Loar; Gladsten; I don't know; there was a dozen of them; he told me

about a meeting at a lawyer's office there Charlie Thompson; he told me a lot of stuff you had better not put in this deposition, I expect.

Q. You are referring to Charlie Thompson, the election commissioner? A. I don't know who he is; I know he is a lawyer.

By Mr. Hackney. He was a lawyer at Kansas City defending this bunch of thieves.

Q. You mentioned Bill Gladsten, Red Loar and Lawrence Hayes as three of the men he told you about? A. Yes, sir, that is my recollection.

Q. Do you remember any other thieves? A. No, sir.

Q. You said he told you who was the leader of the gang; do you remember who that was? A. No, I don't remember which man he designated; he didn't use the word leader—brains.

Q. You say you employed him at a salary of one hundred and fifty dollars per month? A. Yes, sir.

Q. Do you know how he was paid—cash or check? A. Cash, usually.

Q. Who paid him? A. Mr. Boult.

Q. Do you know whether Mr. Boult paid him by cash or check? A. I sent Mr. Boult checks covering his pay, as well as I did some other men similarly employed; now, whether Mr. Boult gave him his check, or cash, I don't know, but I received a receipt from Mr. Boult, signed by McCarthy, for that money.

Q. If it was paid by check, where would those checks be? A. Mr. Boult would have them, if it was paid by check but I don't think he paid him by check; we don't pay those people by check.

Q. Did you know at the time you employed McCarthy that shortly before that he had been convicted in the District Court of Atchison, Kansas, of robbing freight cars? A. Oh, yes, he told me of that conviction during this talk.

Q. How long was that before you had a talk with him? A. I don't remember.

Q. At the time you employed him, he was out on bond pending the appeal of this case to the Supreme Court of Kansas? A. He may have been; I don't know; he had been tried, and I assume that he was, yes.

Q. He had been tried and convicted? A. I take it he was on bond; yes; I assume he was; my recollection is, he told me all about that trial and conviction; I tried to make him tell me his life's history, and I am satisfied he told me of the trial and conviction, and told me he was guilty, too, as far as that is concerned.

Q. Told you a number of other things about his former life? A. In a general way, yes.

Q. Did you know he had been charged with killing a policeman in Kansas City, named FitsGibbons? A. He hadn't been at that time; as I recollect it, that is a later matter, as I understand it.

Q. He didn't tell you that? A. No.

Q. You didn't know that at the time? A. No.

Q. Did you know he had been confined for a period of time in the Industrial School at Topeka, Kansas? A. He told me that.

Q. Did you know he had been confined at one time in the State Reformatory in Minnesota? A. I don't remember his having said that, but, as I recollect it, his whole life had been a life of crime.

Q. You don't recall that particular instance? A. No, sir.

Q. Did you know he had formerly been on the police force in Kansas City? A. No, I don't remember that.

Q. He didn't tell you that? A. I didn't say that; I said I don't remember that; I don't remember whether he told me, or not.

Q. You didn't receive any information that he had been discharged from the police force for shaking down bootleggers? A. No, but if he had been so charged, that wouldn't have interfered in any way with my employing him to be a snitch on a bunch of thieves.

Q. That was the kind of man you were looking for? A. That is the kind of man I wanted, and I knew at the time I employed him what kind of a man he was; that is the way I broke up the gang.

Q. I believe you stated a while ago that it was part of his duties to learn from this gang of thieves when they were going to pull off a robbery? A. Yes, sir.

Q. And it was also his duty to accompany them? A. There was nothing said as to his accompanying the men; that was covered by the general understanding that he was to continue with this gang as formerly; he told me he had been [redacted]ng with this gang; now, I assume, yes, that it was understood he would keep on trailing with them and keep on going with them, but notify us, if possible, beforehand, when he did so, and if possible, to notify us afterwards.

Q. You expected him, I believe you stated, if you couldn't frustrate the robbery— A. He had no instructions to frustrate robbery.

Q. I say, if you couldn't do that, to find out where the stores were located? A. Yes, sir.

Q. Who the fence was? A. Yes, sir.

Q. Now, he was instructed to notify you when these things were going to take place, if possible? A. Notify Mr. Boult, or a man suggested by Mr. Boult, not me.

Q. Not you personally, but to notify you or some of your subordinates? A. Yes, sir.

Q. You say he was to make his reports to Mr. Boult? A. Yes, sir.

Q. Or to someone that Mr. Boult might designate? A. That is it; I left him in Mr. Boult's lap.

Q. That was to enable you to fortify yourselves against the expected robbery? A. Yes, that was to enable us to catch these thieves.

Q. You expected, whenever you got notice from McCarthy that anything like that was to take place, to detail additional men on the train at that time, or wherever the robbery was to occur. A. No, it was taken care of in various ways; that was one of the ways.

Q. What were the other ways? A. Take an automobile and go out and intercept them.

Q. Now, did he have any instructions, Mr. Mitchell, to instigate any robberies, to lead them into a trap? A. Oh, absolutely no.

Q. You didn't expect him to work up a robbery and lead these people into a trap? A. Certainly not.

Q. You never planned anything of that sort at any time? A. Certainly not.

Q. Now, did you have in your employ in April of 1923, a man by the name of David? A. I think so.

Q. In what capacity was he employed? A. He was a special officer or a train rider.

Q. That is James Lee David? A. I believe so.

Q. Do you know who employed him? A. My recollection is he was employed by C. M. Barber.

Q. Who was Mr. Barber? A. Mr. Barber was special agent at Kansas City at that time.

Q. When was he employed, do you know? A. I think about April, 1923, about the same time that McCarthy was employed.

Q. What was he doing; in what capacity was he employed? A. He was employed as special officer or train rider.

Q. What are the duties of a train rider? A. A train rider is a man who rides a train, a freight train, for the purpose of protecting it against robbery, against thieves.

Q. And David then was performing the duties of a train rider? A. Yes, I assume so.

Q. Do you know where he worked? A. Kansas City.

Q. Did he work on any trains that were going out of Kansas City? A. Yes, always on trains going out of Kansas City, or coming in, one or the other.

Q. He went on freight trains carrying merchandise, I suppose? A. Yes, sir.

Q. No particular run; he didn't have any particular run—just any trains coming in or going out? A. I wouldn't attempt to, and I can't tell you that, but I know he was one of several men detailed to the Kansas City office; now, those men were instructed by the local man as to what trains they should ride, when they were to go and when they were to return.

Q. Was he accompanied by anyone else? A. I don't know.

Q. Going on these merchandise trains? A. I don't know.

Q. You don't know whether he was the only train rider on one of them, or whether there was more than one? A. Sometimes there was more than one, sometimes there was one.

Q. On what occasions would there be more than one? A. I don't know; those were details attended to by the local people.

Q. You know in a general way when they would decide to have one on a train and when more than one; you know what would cause them to send more than one? A. If they had the men available, they would probably send more than one, or if the local man thought it necessary for some reason, he might send more than one; that was a matter left in the local man's hands; I gave no particular instructions as to that.

Q. By the way, do you know where McCarthy is now? A. No.

Q. Is he still employed by the railroad company? A. He is not.

Q. When did he leave the employ of the railroad comany? A. I don't know the exact date.

Q. You don't know where he is now located? A. No, sir.

Q. McCarthy's conviction was later affirmed by the Supreme Court of Kansas, wasn't it? A. I don't know.

Q. You don't know about that? A. I probably have all that in my file, but I don't know.

Q. You have no information now about it? A. What is the question?

Q. His conviction was later affirmed by the Supreme Court of Kansas, and he was pardoned by Governor Davis? A. I believe he was pardoned; he is out, at any rate.

Q. Did you have anything to do with securing his pardon? A. Not personally.

Q. Did anyone connected with the Missouri Pacific Railroad, that you know of? A. I don't know that they did not, or that they did; I have no information on that.

Q. At any rate, he is out now, and you don't know where he is, or where he could be located? A. No, sir.

Q. If he had made any reports, he would have made them to Mr. Boult or someone designated by him, would he? A. Yes, sir.

Q. Was he to make reports verbally or in writing? A. He was to make them by 'phone—verbally.

Q. He wasn't instructed to make any written reports? A. Oh, no.

Q. Then, if he made any reports, he made them to Mr. Boult, or to Mr. Boult's assistant? A. I assume so.

Q. Do you know anyone else, other than Mr. Boult, to whom he made any reports, or had any conversation? A. No, I don't.

Q. Mr. Boult would know that? A. Mr. Boult would know that.

Q. You are sure there was no written report of any kind that he made? A. None that I know of.

Q. Do you know whether or not he had accompanied this gang of thieves, or any other gang of thieves, on any of these expeditions prior to the time David was killed? A. I don't know anything about that.

Q. Any reports ever reach you with reference to any of them? A. I don't remember any such reports.

Q. As far as you know, after McCarthy was employed, this particular robbery in which David was killed was the first one that he had information of? A. I didn't say that at all; I don't know of any other reports at all. Now, Mr. Boult may have received reports of numerous attempted robberies; we were being robbed every week around Kansas City at this time.

Q. What I am asking now is, did any information come to you of any robberies that he knew anything about, between the time he was employed and the time Mr. David was killed? A. I don't recollect any such reports.

Q. Then, I say, as far as you know, he had no information concerning any robberies? A. As far as I remember now, I received no reports.

Q. Now, he did know about this attempted robbery that occurred at the time David was killed? A. How is that?

Q. I say, McCarthy did know about that?

By Mr. Hackney: I object to that question as assuming—

A. I don't know whether he knew about it, or not.

Q. Well, didn't McCarthy later on report that these were the men— A. To whom?

By Mr. Hackney: I object to that as hearsay.

Q. Report to someone connected with the Missouri Pacific? A. He didn't report to me.

Q. Were any reports made to the company that you have any knowledge of? A. No, sir.

Q. Concerning his connection with this robbery? A. He may have made reports, but I don't know anything about them.

Q. Was David working under Mr. Boult also? A. In this way: He was working for the division special agent, who was working under Mr. Boult.

Q. Do you know who employed, Mr. David? A. I think Mr. Barber, C. M. Barber.

Q. Mr. Boult didn't do that personally? A. No, he didn't do that personally.

Q. Did you ever see McCarthy between the time you first employed him and the time David was killed? A. I don't think so.

Q. Never talked to him any more? A. I don't think so.

Q. All the instructions you gave him were given at the time you employed him in the Baltimore Hotel? A. Well, any further instructions; of course, went through Mr. Boult; I may have conferred with Mr. Boult and he may have car-

ried something from me to McCarthy, but, personally, I never talked to Mr. McCarthy.

Q. Do you recall any instructions that you told Mr. Boult to give him after you employed him? A. No, I wouldn't give Mr. Boult a specific instruction of that sort, any way; he is a capable man and after making an arrangement of this sort, I simply left it in his lap. We can't pass those details down that way.

Q. You may have talked to Mr. Boult about McCarthy's duties? A. No, I certainly would not; I did not.

Q. How long did McCarthy remain in the employ of the company after this—how long did he remain in the employ of the company? A. I don't know; sometime after McCarthy testified, we got him a job at some of our roundhouses or shops, and I kept him employed for some time, as long as he wanted to be employed; finally, he left of his own accord.

Q. After these men were tried, he didn't work any longer in the capacity in which he was first employed? A. No, there was no longer any necessity for it; they were convicted; then he was found a job as a laborer or something of that sort in our shops.

Q. Where did he work, what shops? A. I think at Kansas City.

Q. Shops at Kansas City? A. I think so.

Q. Do you know how long he continued working there? A. No, I don't know as to that, but some time.

Q. You don't remember the last time that he worked for the company? A. No, I have no information on that.

By Mr. Hackney: That is pretty hard to trace; he probably worked in some other name.

Q. What is the last time you have any definite recollection of McCarthy? A. The last time?

Q. Yes. A. I couldn't give you a date at all; he remained in our service for some time, I don't know how long—as long as he wanted to stay. My recollection is that Mr. Boult told me that McCarthy had quit and gone off; it is indefinite in my mind; I don't remember what he said to me; my instruction to Boult was to help McCarthy and keep him employed in a laborer's job, so that he would go straight.

Q. And you can't recall now the last time that you have any knowledge of his still being in the employ of the company? A. No, I couldn't tell you any date.

Q. As far as you recall, the last place he ever worked was probably in a shop or roundhouse at Kansas City? A. Yes, I think that is true.

By Mr. Boisseau: I think that is all.

Cross Examination by Mr. Hackney.

Q. Mr. Mitchell, I understood you to say that your sole purpose in employing Harry McCarthy was to get information of the activities of this bunch of thieves that had been robbing the box cars? A. That is true.

Q. And he was not—you didn't authorize him to carry a gun or arm himself in any way? A. No, not at all.

Q. Or to do any act of apprehending any person, or frustrating any criminal act? A. No, sir.

Q. He was simply to get information? A. Information was all we wanted from McCarthy.

Q. And he wasn't to stage any robberies? A. It was understood that he never had staged any, and that he was not to stage any; the understanding was, he had been trailing with these people and was to continue to do so.

Q. So after the killing of David, then McCarthy assisted in convicting these men that were responsible for Mr. David's death? A. Testified against them, yes, sir.

Q. They were on trial over there in the Kansas court and Gladsten is the man shown to have shot David? A. Was convicted of shooting David.

Q. And is serving a life sentence now? A. And is serving a life sentence now.

Q. At Lansing, Kansas? A. Yes, sir.

By Mr. Hackney: That is all.

Re-Direct Examination by Mr. Boisseau.

Q. You say, I understood, that it was understood he had never staged any robberies?

By Mr. Hackney: No, that he didn't authorize him to stage any.

A. He told me, in talking of the brains of the gang—I asked him if he had ever planned any of these robberies, or had ever been the leader, and he laughingly said, no, he didn't have brains enough, and he never had been the brains of the gang.

Q. Now, have you testified here, as near as you can recall, to the substance of all the conversation you had with him at that time? A. No, I talked to him three hours and I haven't attempted

to detail that conversation here, and I won't attempt to detail it.

Q. You gave quite a little bit of it in your direct examination? A. The high lights that I remembered at that time, yes.

Q. Do you remember any more of it? A. I might ramble on here and tell you some things he said; they are not so clear in my mind, though, as they were a day or two after that, or a year after that, if you please.

Q. It was all along the same line you have testified to? A. Yes.

Q. Now, did you talk to him about carrying a gun at all? A. My recollection is that he told me he didn't have a gun and didn't carry one, but I am not clear on that.

Q. That is your recollection about it now? A. Yes, that he did not carry a gun in any of these robberies.

Q. You didn't discuss with him the question of whether or not he was to carry a gun, did you? A. My recollection is not clear as to what he may have said about a gun, but if—I will put it this way—if he at any time mentioned the gun proposition, it is safe for me to assume that I warned him to leave his gun at home and not to have a gun.

Q. You are stating that because you think that is what you would do under those circumstances, and not because you remember? A. Exactly, and I told you awhile ago I didn't remember it, and you are insisting on me saying something.

Q. No, I am not, Mr. Mitchell. A. Well, I don't remember his saying anything about a gun to me except that he did not have a gun.

Q. All right? A. Now, in talking to a man about a gun, when he tells me he hasn't got a gun, I assume he is not carrying a gun; I know he is not carrying it at that time, because he hasn't got one, and it is safe for me to assume, because it is my practice, to say "You are better off without one," or "If you have got one, you had better leave it home," but I don't remember to have discussed the gun proposition, other than McCarthy saying "I haven't got a gun."

Q. You don't have any recollection of telling him anything about it, do you? A. No, but I have a recollection of McCarthy saying he didn't have a gun.

Q. The substance of your three hours' conversation amounts to this, then: That he was to continue to trail with these thieves, with whom he was acquainted, and was associating, to acquire any information he could possibly get about any anticipated robberies they were going to pull off, and to immediately inform you of those things? A. Yes. Now, this conversation wasn't so much on my part to get details of McCarthy's past life, etc., but was to get a reaction or an impression as to what I could expect from McCarthy in the way of assistance.

Q. Whether or not you could trust him? A. Absolutely; during this talk I convinced myself, here is a man I could use; when I got to that point, I called to Mr. Boult; that is the reason I don't remember a lot of these details; a lot of

this talk was not for the purpose of getting details; it was for the purpose of getting impressions.

By Mr. Boisseau: That is all.

Further Cross Examination by Mr. Hackney.

Q. You do know that you did not expressly direct, or even authorize McCarthy to carry a gun? A. Never at any time.

Q. There was no understanding that he should be armed as he went out with these thieves? A. Never, and never any understanding that he was to try to apprehend any thieves.

Q. On the contrary, he was not to do that? A. Not to do that; in fact, it was agreed that he would not be even asked to testify against these thieves; he was employed as a snitch.

By Mr. Hackney: That is all.

Mr. Freet: The plaintiff now offers in evidence the deposition of Mr. Boult.

Admitted in evidence.

Which said deposition is in the words and figures as follows, to-wit:

W. H. BOULLT, of lawful age, produced, sworn and examined as a witness on behalf of plaintiff, deposeth and saith:

Direct Examination by Mr. Talbert.

Q. State your full name? A. W. H. Boullt.

Q. And where do you reside? A. 5501 Woodland, Kansas City, Missouri.

Q. Where are you employed? A. Missouri Pacific Railroad Company.

Q. What capacity? A. I am assistant chief special agent.

Q. Where is your office located? A. Union and Liberty Streets.

Q. Kansas City? A. Kansas City.

Q. How long have you held that position? A. Since 1916.

Q. Who is the chief special agent? You say you are assistant. A. Let me get you right on that, I held that before that I was special agent before that.

Q. Well, how long have you been assistant chief special agent? A. Since 1916.

Q. Were you connected with the company before that? A. Special agent from 1910.

Q. Since 1910? A. Yes, sir.

Q. Who is chief special agent? A. R. S. Mitchell.

Q. St. Louis? A. St. Louis, Railway Exchange Building.

Q. What part of the system do you have charge of? A. I have everything west of St. Louis.

Q. What are your duties as assistant chief special agent? A. To instruct special agents and special officers in their work.

Q. And what does that generally consist of? A. Well, some damage suits, some personal injuries, mostly robberies.

Q. Do you have charge of the employees known as train riders? A. I am over all the men, I do not hire them. The special agent in each terminal hires them in.

Q. Who is the special agent at Kansas City? A. J. H. Baehr now.

Q. Was he the special agent at Kansas City at the time Mr. David was killed, namely May 17, 1923? A. He was not.

Q. Who was special agent at that time? A. C. M. Barber.

Q. Where is he now located? A. In St. Louis.

Q. Still connected with the company? A. Yes, sir.

Q. Was the company employing any train riders in the month of May, 1923? A. Yes, sir.

Q. At Kansas City? A. Yes, sir.

Q. What were the duties of a train rider? A. The duties were where our trains start to go over the trains, examine the trains before departing from the terminal.

Q. For what purpose? A. To see that they were all right.

Q. Well, in what respect, that they were all right? A. No seals broke, properly sealed.

Q. And then when the train started they would go with it? A. They would go with it.

Q. And what would be their duties along the road? A. If the train stopped anywhere, to go and see if the seals were all intact and the train was all right.

Q. Where were they expected to ride when the train was enroute? A. While they were on the train?

Q. Where would they ride? A. That was left to their judgment, we couldn't just tell them where to ride.

Q. You mean as their work required it, they might ride inside the box car or outside the box

car in the caboose? A. Or in the caboose, we always left that to their judgment.

Q. Were any train riders instructed to go armed? A. We never instructed them at all, they was to protect the train.

Q. You knew, did you not, as to whether or not they were going armed, or whether they were going unarmed? A. Apparently did.

Q. Well, didn't you give them any instructions in that respect? A. We never gave them any instructions not to go armed.

Q. Well, did you ever give them any instructions to go armed? A. I don't know that I ever did.

Q. When they went armed who provided them with guns, pistols, or firearms? A. They had them themselves. We didn't, the Missouri Pacific didn't.

Q. Were these train riders—did they hold commissions as special officers? A. I think they did.

Mr. Hackney: You mean from the local authorities? A. From the local authorities, yes, sir.

Q. Who attended to getting their commissions? A. Well, if they got a police commission they would make out a form which would be presented to the Board of Commissioners, sometimes we would O. K. the form for them.

Q. Do you recall when David was employed? A. No, I just can't recall the date, can't remember the date, I may have been on the road.

Q. Can you recall how long he had been working for the company prior to his death? A. No, I can't state that.

Q. He was employed as a train rider as I understand? A. Yes, sir.

Q. Do you have any recollection as to how long he had been working for the company, was it a year, or a few months, or two months, or what? A. Oh, it was several months, I couldn't say, might have been one month or two months or three months.

Q. Did he have any particular run assigned to him? A. We don't assign—in a way we do and in a way we don't, this man, at that time, I think, was riding between Kansas City and Atchison.

Q. Atchison Kansas. A. Atchison, Kansas.

Q. You mean between Kansas City, Missouri, and Atchison, Kansas? A. Between Kansas City, Missouri, and Atchison, Kansas.

Q. Who would direct the train riders from time to time as to what runs they would take? A. The special agent.

Q. That would be Mr. Baehr? A. Mr. Baehr or Mr. Barber who was here at that time.

Q. Do you know what wages David received? A. I think $135.00 a month, and his expense when he was away from the terminal.

Q. He would ride freight trains, as I understand it? A. Yes, sir; and sometimes passenger trains.

Q. Now, on this run to Atchison, where would the train be made up? A. The train is made up in the east bottoms, that is the east yards, Kansas City, Missouri.

Q. Is that the place where he would make this inspection and board the train? A. Sometimes, sometimes he wouldn't.

Q. Where would he board it at other times? A. It would be near the Kaw Bridge.

Q. Is that in Kansas, or Missouri? A. Just across the line in Missouri.

Q. I wish you would just explain? A. At times the merchandise would be pulled from the house and set over on A. C. Junction, that is just this side of the Kaw Bridge.

Q. In Missouri? A. In Missouri. He would inspect it there, he would sometimes go over there and inspect these cars while they were standing there before the train came through and picked them up, then sometimes he would inspect them over in Kansas City, Missouri.

Q. What do you mean by "merchandise being pulled from the house"? A. That is merchandise loaded at our freight house—loaded at our freight house—destination may be Atchison, St. Joe, Omaha, or Falls City, Nebraska, or different places in Nebraska.

Q. Where was your freight house located? A. Union and Liberty Street.

Q. Kansas City, Missouri? A. Kansas City, Missouri.

Q. Are you acquainted with a man by the name of Harry McCarthy? A. Yes, sir.

Q. Where did you first become acquainted with him? A. I think it was in the Baltimore Hotel.

Q. Kansas City, Missouri? A. Kansas City, Missouri.

Q. About what date? A. About the fifth of April, 1923.

Q. What was the occasion for your meeting him there? A. I was called there by Mr. R. S. Mitchell, chief special agent.

Q. What was the purpose of meeting McCarthy there at that time? A. Why he and Mr. Mitchell had been talking over different robberies that had happened on the road and we were figuring on employing McCarthy, I think, at that time.

Q. Well, was McCarthy employed there on that date? A. He was.

Q. What did McCarthy say in respect to any robberies, hold-ups, he had been connected with? A. He was working with a gang that had been robbing cars.

Q. What did he say about that? A. He said he knew who were robbing the cars.

Q. At what particular place, what particular cars? A. Different places on the road.

Q. Well, can you mention any particular run? A. Well, no particular run, they don't rob any particular runs at different parts of the road, they may have been robbing at Atchison, Leavenworth, Stillwell, Kansas, and Osawatomie, Kansas.

Q. Well, now, did McCarthy say he had been participating with this gang? A. I don't know whether he said he had been participating, but he knew them and would assist us in locating them.

Q. You knew at the time that McCarthy was a box-car thief himself, did you not? A. I knew he had been, yes, sir. I had heard it.

Q. You knew, did you not, that he had been convicted for robbing your own company's cars at Atchison, Kansas, didn't you? A. Yes, sir.

Q. And was out on bond at the time you had this conversation with him there at the Baltimore Hotel? A. I don't know just how the cases stood.

Q. But you did know he had been convicted for robbing your box-cars? A. Yes, sir.

Q. Did McCarthy tell you anything about his past life? A. Later on he did.

Q. What did he say about that? A. That he had went to reform school.

Q. Where? A. At Minneapolis, I think he said, as a boy.

Q. Did he tell you any other institutions he had been in? A. I don't think he did.

Q. Who did he say this gang of robbers were that he knew and that he could inform you about? A. Bert Gladston, Red Loar, Lawrence Hayes, Hoggy Ward, I think he mentioned, he may have mentioned others, I couldn't very well remember right now.

Q. Well, now, did he tell you he had been robbing with these men, or that he merely knew them? A. I took it from his talk he had been with them.

Q. Participating? A. Participating, yes, he didn't come right out and say it, but I took it from his talk.

Q. Did he say anything about why he was willing to give information about his comrades? A. I think he said he wanted to start over and lead a new life, I think that is about what he said.

Q. What salary did the company undertake to pay him, or wage? A. Well, it is one hundred and fifty dollars a month, at that rate, at the rate of one hundred and fifty dollars a month.

Q. How frequently was he to be paid? A. Every month.

Q. By the month? A. Well, yes, by the month, and if he wanted money, we would give it to him.

Q. Was he to receive any additional money for expenses or anything of that sort? A. No, sir.

Q. Now, when he was employed what instructions did you give him in respect to what he was to do? A. Well, we couldn't very well give him instructions, he was a man to furnish us with information where these robberies were committed, who was committing them and if he could get to us in time to tell us before the robbery was committed, if not, to tell us what had become of the goods.

Q. Well, what was the plan and arrangement in respect to whether or not he was to go with this gang on their robberies, robbing expeditions? A. He was to continue the same as he did to get information, that is generally up to the man's own idea that is working.

Q. Well, do you mean the plan was that he was to continue with this gang, Gladston, Loar, Hayes and others? A. His instructions were that he was to get us word before the robbery was committed, if he could, if not, to give us information as soon as he could after the robbery had been committed.

Q. Who was he to report this information to? A. Myself.

Q. Did you advise him as to how to reach you any time through the night or day? A. Through the telephone.

Q. Now, you say that if he learned that a robbery was to be staged or pulled off he was to notify you if possible? A. If possible, yes, sir.

Q. In advance, of where the robbery was to take place? A. Yes, sir.

Q. Now, you say, if it was possible, McCarthy was to give you this information in advance of the robbery? A. If he could, yes, sir.

Q. By "possible" do you mean if he could do that without letting the gang know he was giving the information? A. Why, he would have to use his own judgment about that. You see, we couldn't tell him how to use this information.

Q. Well, what I mean is this, of course— A. (interrupting) You mean, if he could give it to me before, so the gang wouldn't know it?

Q. Yes? A. Yes.

Q. To make myself clear, I mean this, if he knew the gang was going to pull off a robbery at Leavenworth, of course, he couldn't boldly go right to a telephone and in their presence call you up and say, "The gang are going to pull off a robbery at Leavenworth?" A. Yes, sir.

Q. But I understand he was to notify you, if he could, without tipping off the gang that he was giving notice? A. That is right.

Q. What did he say when you met him there at the Baltimore Hotel in reference to where this gang had been operating? A. Well, different places.

Q. Just name them. A. All right, Osawatomie, Kansas, Stillwell, Paola, Raytown, Missouri, Leavenworth, Kansas, Pleasant Hill, Missouri, he

may have said some other places, I don't just remember.

Q. What were the instructions given to McCarthy with respect to his going right along with the gang and at least pretending to participate in the robberies the same as the others? A. He was to continue as he was doing.

Q. As he had been doing, you mean? A. Yes, sir; as he had been doing.

Q. As to his ways and means and methods of securing this information for you with respect to who this gang was when they were robbing you and if they had robbed you, what became of the goods, you left that largely to the discretion of McCarthy? A. Yes, to furnish us the information.

Q. Now, after McCarthy was employed did he report for duty to you or to anybody else at any particular place each day or each week? A. At times he would call up on the 'phone when he wanted to give us any information.

Q. Who would he call, you? A. Yes, sir; call me.

Q. He didn't report to you each day in person? A. No, sir.

Q. I mean, he didn't show up at any particular place? A. No.

Q. Just called you from time to time on the telephone? A. Yes.

Q. As a rule would he call you each day? A. No, I don't think he would each day.

Q. He didn't punch a clock? A. No, sir; he did not.

Q. Were his reports to you all verbal, or were there some that were in writing? A. I don't know that—I don't think he ever wrote me out a report.

Q. Did McCarthy report to you at any time before David was killed with respect to any intended robberies or robberies that had actually taken place? A. He had.

Q. What information had he given you prior to the time David was killed with respect to activities of this gang of thieves? A. I remember one very well, that he reported to me that this gang was going to rob the train at Kenneth Tank, Kansas.

Q. What did he say, what was his report? A. He informed me that they were going to rob our train that night at Kenneth, made that report to me on 15th Street.

Q. In person? A. Yes, sir.

Q. And how long was that, about what time of day was that he gave you that report? A. It was about five o'clock in the afternoon.

Q. And what time did the train pass through Kenneth? A. Well, there are three or four of them pass through.

Q. Well, did he report which train they were on? A. We immediately went there with the men to cover that place.

Q. Did he tell you which train? A. No, he didn't say what train.

Q. Well, what train passed through there that night after five o'clock that might be robbed? A. There is No. 477, freight train.

Q. What hour did that go through? A. Well, you can't tell that.

Q. Approximately what hour was it due? A. They go through from ten o'clock to two o'clock in the morning, sixty-five, 61, and then there may be an extra.

Q. So a number of trains might go through there that night? A. Might go through that night.

Q. Upon receiving that information what did you do? A. We immediately got our men, got help from Paola, and covered this point all night.

Q. Did you also notify the train riders on these respective trains to be on the look-out? A. Yes, sir.

Q. Did you put on any extra train riders? A. That night we didn't. We didn't have them.

Q. But you warned them all? A. We warned them all.

Q. And in addition to that you had police officers covering the place where the robbery was expected to take place? A. Not that night.

Q. I thought you said you had some men go there that night? A. Our own men.

Q. What men did you have go? A. We had the special agent, C. M. Barber, and J. N. Blank.

Q. Who was he? A. A special officer.

Q. Yes. A. And John Parhan.

Q. Special officer? A. He is a lieutenant, and W. H. Boullt, myself.

Q. All employees of the railroad company? A. And a man by the name of Ollie Plant.

Q. All employees of the railroad company? A. Yes, sir.

Q. Did you all go there armed? A. We did.

Q. Did you instruct the train riders to go armed that night? A. No, I told them to look out, that we would be along at this place, to not pay any attention if they seen us there.

Q. You assumed when you told them to look out they would have sense enough to go armed? A. I thought so.

Q. Did the robbery take place, or attempted robbery? A. No, sir.

Q. Did McCarthy advise you later as to what had happened? A. He did.

Q. What did he say? A. He said they all got mixed up over in Argentine and decided it was too late to go out, the bunch did.

Q. Well, did he make any other report to you? A. Oh, he may have made several reports.

Q. Well, do you remember any other report that he made? A. No, I can't right off-handed, no I can't remember.

Q. Did he make any report to you in respect to any robberies that had actually taken place, and in which he didn't have an opportunity to notify you in advance? A. No, sir.

Q. How long did McCarthy continue in the employment of the railroad company under your department?

Mr. Hackney: As an informer?

Q. Yes, as an informer. A. As an informer, well, I think until about June, 1923.

Q. Where did he receive his pay check? A. He didn't receive any pay check.

Q. What did he get? A. Cash money.

Q. Who delivered it to him? A. I did.

Q. Each month? A. Yes, sir; or if he needed it before, I would get it to him.

Q. You would advance it? A. Yes, sir.

Q. But you paid him in cash? A. Paid him in cash, yes, sir.

Q. Was any voucher or draft drawn by the treasurer of the company, covering his salary that you would then cash? And turn the cash to him?

A. No, sir; no draft at all, or pay check or anything of the kind.

Q. What voucher or pay check did you sign to get this money? A. I didn't sign any voucher at all.

Q. From whom did you get the money? A. I got the money from R. S. Mitchell.

Q. Every month you would get the cash from Mr. Mitchell? A. I would, sir.

Q. How would the cash be transmitted to you? A. The cash would come to me in Mr. Mitchell's personal check for him and the other men, made payable to W. H. Boullt.

Q. Did you pay all your informers in that manner by paying them cash? A. I paid all men employed under me in that line of duty by cash.

Q. You say Mr. Mitchell would simply send you a check for the total amount? A. For the total amount.

Q. And then you would cash it? A. I would cash it.

Q. And deliver the cash to these men? A. Deliver the cash.

Q. Did you take any receipts from those men? A. Certainly, I did, I would protect myself.

Q. You took a receipt from McCarthy? A. I did.

Q. What did you do with those receipts? A. I sent them in to St. Louis to cover that check.

Q. To show the disbursement you made? A. Yes, sir.

Q. So that they were sent to Mr. Mitchell? A. Yes, sir.

Q. Do you remember the occasion on which Mr. David was killed at Leavenworth, Kansas? A. I think it was about two o'clock in the morning, the morning he was killed I got a telephone call.

Q. When had McCarthy last made any report to you either over the telephone, in writing, or verbally, or otherwise, prior to that time? A. Well, I just couldn't say just what date that was.

Q. Well, with that incident in your mind, can you say whether or not he had made any communication with you the day before? A. It might have been the day before or several days, might have been the day before he had a talk with me.

Q. What is your best recollection? A. Well, it might have been the day before he called me on the 'phone.

Q. Do you remember what he said to you at that time? A. No, I just can't remember what all he did have to say.

Q. I understand that this gang of thieves, or at least a considerable part of them had been attending the trial of the criminal case which, I think, Hoggy Ward was the defendant, the day before this incident at Leavenworth, the trial as it was being held at the District Court in Kansas City, Kansas, did McCarthy make any report to you in respect to the fact that the gang was there at that trial? A. I don't think he did.

Mr. Hackney: You mean you heard that afterwards?

A. Afterwards.

Q. (Mr. Talbert) Had McCarthy made any report to you of any kind at any time before this attempted robbery took place at Leavenworth, Kansas, in which David was killed? A. Oh, he had made reports.

Mr. Hackney: As I understand—about this contemplated robbery that night—

Mr. Talbert (interrupting): Read the question.

(Last question read by the notary.)

A. You mean intended robbery, before that?

Q. (Mr. Talbert) I mean in reference to that robbery. A. No, sir.

Q. So, if I understand you, McCarthy had made no report to you, or to anyone connected with the company, as far as you know in respect to the intention of the gang to rob your train at Leavenworth on the night of May 16th, or at the time David was killed? A. Or the morning of the 17th, no, sir, he had not.

Q. Had he to your knowledge made a report to any other person connected with the railroad company of such fact? A. No, sir.

Q. What train was it that David was a train rider on at the time of his death, what is the number of his train? A. Well, now, I just can't think—163 and 172 goes that way, and I just can't remember which train.

Q. Was it one of those trains? A. Yes.

Q. Either 163 or 172? A. Yes.

Q. Where did that particular train that David rode and was riding at the time of his death, where did it start from and what was its destination? A. It started from the east bottoms.

Q. Kansas City, Missouri? A. Kansas City Missouri, and his destination to ride that train was to Atchison, Kansas.

Q. What was the final terminus of that train? A. If it was one of those two trains, it may have been split up at Atchison, part of the merchan-

dise would go to St. Joe, part would go to Falls City, Nebraska, and part to Omaha, Nebraska, and some of it may go to Lincoln, Nebraska.

Q. How many train riders were riding that particular train? A. That night?

Q. Yes. A. That David was killed?

Q. Yes. A. Two.

Q. David was one and who was the other? A. Boyd was the other.

Q. What is his full name? A. I don't know his full name.

Q. B-o-y-d? A. Yes.

Q. Is he still with you? A. No, sir.

Q. Do you know where he is? A. No, sir; I do not.

Q. What was the first information you received from any source in respect to this attempted robbery at Leavenworth, in which David was killed? A. I was called at my residence, 5501 Woodland, and night sergeant Graham informed me that David had been shot at Leavenworth and he would be by with C. M. Barber, special agent, and he informed me, said he would be out in his car in a few minutes and drive to Leavenworth.

Q. Did he come and get you? A. He came out in company with Mr. Barber, special agent, Mr. Graham, night sergeant, Mr. John Parhan and we drove to Leavenworth.

Q. Who is Mr. Parhan? A. Sergeant then special agent.

Q. All men employed under you? A. Yes, sir.

Q. You did then drive to Leavenworth? A. Yes, sir.

Q. What did you find when you got there? A. We drove to the chief of police's office first.

Q. Go ahead and relate what you found, what took place? A. We called on Mr. Young, and we then went down to the scene of this killing, went over the ground, in company with Mr. Boyd, who was riding with train rider David and looked over the scene of the killing, went up over the hill, made all the investigation we could at that time, and then went back to the undertaker's establishment and talked to the undertaker. Then back to Chief Police Young's office.

Q. Describe as best you can the exact location of the place where the killing took place? A. Well, that was in the south Leavenworth yards where there is a very steep bank on the west side, and east—southeast, oh, I guess two hundred yards or more, as near as I could tell there is a high bank there where there had been some cinders dumped out from a mine, and I guess a quarter of a mile further there was a stream running east and northwest, a tressle over that.

Q. Was David dead when you arrived? A. He was.

Q. Do you know how long he lived after he was shot? A. I do not.

Q. Did you examine his body to see where he had been struck by a bullet? A. No, sir.

Q. Did he have any fire-arms on his person at the time he was killed. A. I didn't see any.

(The following three questions were withdrawn and not read by plaintiff's counsel.)

Q. Did you learn whether or not he had? A. Yes, I heard he had.

Q. What fire-arms did he have? A. He had a .45 automatic Colts and he had a sawed-off shot gun.

Q. Do you know to whom these fire-arms belonged, whose property they were? A. The pistol was his, I suppose the shotgun belonged to the railroad company.

(Reading of deposition resumed.)

Q. When did you first receive any report or information from McCarthy in respect to this robbery? A. The next morning.

Q. What time? A. Probably between seven and eight o'clock, might have been seven o'clock.

Q. And where were you when you received this information? A. I was in Leavenworth, Kansas.

Q. How did you talk with McCarthy? A. I talked over the 'phone to Mr. H. K. Lewers, special officer in my office, and then later talked to McCarthy, just while he was there.

Q. McCarthy was then in your office and you were in Leavenworth? A. Yes, sir.

Q. Did you later have any further conversation with McCarthy? A. I did.

Q. Where? A. Kansas City, Missouri.

Q. At your office? A. Yes, sir.

Q. What report did McCarthy make to you in respect to this robbery or attempted robbery? A. He gave me all the information on who killed David, how it happened, and he went to Leavenworth with me to make the report to Mr. McNaughton, the county attorney.

Q. What information did he give you as to who the gang was, where they started from, where

it was organized and when the robbery was planned? A. It started at Kansas City, they drove to Leavenworth in Lawrence Hayes' car, Bert Gladston, Red Loar, Lawrence Hayes and McCarthy.

Q. What did McCarthy say with respect to whether he went over from the automobile to the train armed with a gun or crowbar or other implements? A. He said he was given a gun by Bert Gladston and they went over.

Q. He carried that gun? A. Yes, sir.

(The following questions were by the plaintiff's counsel withdrawn and not read to the jury.)

Q. And what did McCarthy tell you in respect to when they had arranged or planned this robbery? A. That afternoon very late, that they were riding down Minnesota Avenue and they were near the bluff, near the C. G. W. Bridge and seen a train coming over to Atchison and Lawrence Hayes made the remark, he says, "there is a good train, let's make it," and they went back up the street—

Q. (interrupting) Who all was in the gang at that time, did he say? A. Lawrence Hayes, McCarthy and some other fellow, I forgot his name, there was three of them in it, they went back up the street and picked up Bert Gladston, and then they got Red Loar, then they drove up to a drug store and McCarthy got out and went in and tried to get a telephone to call me. Then this bunch came in on him and that time he bought a rubber doll—I won't say a rubber doll, a doll for his baby to throw them off, then he wanted to go

home to change his clothes in order to get to call me, but they wouldn't let him do it.

Q. About what hour in the afternoon did he say it was when Lawrence Hayes suggested that they make that train? A. I couldn't tell you exactly, the train was coming across the Kaw River then, they had been riding around together over in Kansas.

Q. Did he say about what hour that was when that occurred? A. No, he didn't just exactly say what hour.

Q. Did he say he had made any other attempts to communicate with you before this robbery was pulled off? A. He said he did not have any other chance to do it, only two attempts, he made when he went into the drug store and then tried to get them to let him go home and change his clothes.

(Reading of deposition resumed.)

Q. Where was McCarthy living at that time, do you know where his residence was? A. I believe he was living with his wife's folks, I don't remember the number, I don't know whether it was on Twelfth Street or not, no,—that is his mother lives there on Twelfth and Park, somewhere out there.

Q. On the Missouri side? A. On the Missouri side, yes sir.

Q. Do you know what became of McCarthy after he quit working for the railroad company as an informer? A. Well, I have seen him around town here, I don't know exactly where he is now.

Q. Well, do you know who he went to work for after he left the railroad company? A. No, I don't know who he went to work for.

Q. Is his mother living? A. Yes, sir.

Q. Is his father living? A. I think his step-father is, I don't know whether it is his father or not.

Q. Do you know his mother's present name? A. I think it is Mrs. Ella McCarthy.

Q. If he has a step-father it probably wouldn't be. A. Yes, he has a step-father, either his step-father or his father, I don't know.

Q. Do you know where she lives, you spoke of Twelfth and Park? A. Well, now, she may live there, I don't know.

Q. Has McCarthy any family? A. A wife and little girl.

Q. Do you know whether or not McCarthy was finally pardoned by Governor Davis from the conviction for stealing from your cars at Atchison? A. Pardoned by Governor Davis?

Q. Yes. A. I don't think he was.

Q. Was it your understanding that he was convicted and that the Supreme Court affirmed his sentence? A. I think so.

Q. Do you know why he didn't serve time? A. I think he was paroled.

Q. Who paroled him? A. I think the judge paroled him from the bench.

Q. Do you know that to be the fact? A. I think so.

Q. Who was he paroled to, do you know? A. I do not know.

Q. Do you know the length of his parole, the terms of it? A. I think it was two and a half years, I wouldn't state positive, but that is my best knowledge.

Q. Did you have anything to do with securing a parole for him? A. No, sir, I never spoke to the judge.

Q. Did you recommend a parole? A. I didn't go up and talk to the judge, I may have said I would like to see him paroled, I didn't go up there.

Q. I mean, did you sign any application? A. No, sir, I signed no application.

Q. Did anybody else, on behalf of the railroad company, to your knowledge? A. I don't know.

Q. You were interested in getting him paroled, were you? A. I was interested in this way, that he assisted in getting the biggest bunch of thieves and bank robbers and murderers, the man who had formerly shot our special agent, Fred Conklin, at Osawatomie, and we had the two men, Gladston and Loar in penitentiary, and I thought he deserved some credit for his good work.

Q. Did McCarthy assist you in apprehending any other thieves, other than Gladston, Loar and Hayes? A. No, not that I know of.

Q. Did McCarthy make reports to anybody else connected with the railroad company other than yourself? A. No, sir.

Q. He was directed to report to you? A. To me.

Q. He didn't make reports to Mr. Barber, did he? A. He may have talked to him sometime,

but I don't think he did, unless I was out on the road.

Q. If you were here, his instructions were to report to you? A. To report to me, yes, sir.

Q. As I understand you, McCarthy was not to report an intended robbery to you unless he could do it without letting the gang know that he was so reporting? A. Not uncovering himself, no.

Q. That is right, isn't it? A. Yes, sir, so he wouldn't uncover himself.

Q. So they wouldn't get on? A. Yes.

Q. Was McCarthy instructed to instigate any robberies in order to lead the gang into a trap? A. No, sir.

Q. Do you know of any expeditions on which McCarthy accompanied this gang of thieves other than the time when they went to Leavenworth? A. No, sir.

Q. Did he ever report to you having accompanied these thieves on any other expedition after his employment? A. No, sir, I don't think he did.

Q. At the time you employed McCarthy did you know that he was being charged with having killed a policeman in Kansas City, Missouri, by the name of Fitzgibbons? A. I never heard that name.

Q. Or any similar name? A. No, sir.

Q. Well, did you know he was being charged with having killed anybody? A. At that time?

Q. Yes. A. No, sir.

Q. When did you first learn that? A. After he testified at the preliminary hearing at Leavenworth, Kansas.

Mr. Hackney: That is the preliminary of this gang?

A. Bert Gladston and Lawrence Hayes and Red Loar.

Q. Don't you know that McCarthy was fired off the police force of Kansas City, Missouri, for shaking down bootleggers? A. What time do you mean?

Q. At any time? A. Before this killing?

Q. Or since, or any time? A. I heard afterwards.

Q. You heard him so testify at the time of the trial? A. I heard him and Lawrence Hayes and Loar.

Q. He admitted it while he was testifying? A. Yes, sir.

Q. After McCarthy was employed over at the Baltimore Hotel, did you give him any further instructions at any time in respect to the nature of his work? A. No, sir, he was to inform us, we talked to him, if he would give us any information as to where the robberies were going to be committed, then we was to use our judgment.

Q. Did you give him the names of any persons you were suspecting and tell him to try to get the confidence of such persons and ascertain what they were doing? A. No, sir.

Q. Where did McCarthy say he and the gang had supper that night before they went to Leavenworth? A. I don't remember if he said, he may have said—I may have heard him at the trial of Gladston, Loar and Hayes at Leavenworth, he may have testified that, but I don't remember.

Q. Had any warnings or instructions been issued to Boyd and David to be on the look-out for thieves at Leavenworth the night David was killed? A. That night?

Q. Yes. A. That same night.

Q. Yes. A. I hadn't issued, I had had instructions issued previous to that.

Q. What instructions had been issued previous to that? A. Instructions had been issued to all train riders on account of having so many robberies, to be on the look-out for robberies and be able to protect themselves, by all means not to get hurt, if they could prevent it.

Q. Had any warning or information been given David or Boyd of this particular intended robbery at Leavenworth, Kansas? A. The night David was killed?

Q. The night David was killed. A. I had no information that there was going to be one and there was no reason why we should give them one that night.

Q. So, you didn't give— A. (interrupting) They had general instructions at all times.

Q. I say, so you didn't give them any particular instructions that night? A. I didn't have any information.

(The following two questions were by plaintiff's counsel withdrawn and not read to the jury.)

Q. McCarthy's excuse to you for not having notified you was that he didn't get an opportunity to do it, because the gang followed him up into the drug store? A. I don't know whether he said it was an excuse, that is what he told me why he didn't notify me.

Q. That is, he couldn't give you the information without frustrating the hold-up or the robbery? A. Without being killed.

(Reading of deposition resumed.)

Q. Is that right? A. Yes, sir; they did.

Mr. Talbert: Read the question.

(Last question read by the notary.)

A. No, sir. And he was afraid to do it.

Mr. Talbert: I believe that is all.

Mr. Hackney: That is all.

At the conclusion of the reading of said deposition by plaintiff's counsel, with the exception of the parts aforesaid, counsel for defendant offered in evidence those parts of said deposition withdrawn by plaintiff's counsel aforesaid. Plaintiff objected to the reading of said parts of said deposition, and this objection was sustained by the court and those parts of said deposition were excluded. To which action and decision of the court in excluding said parts of said deposition, the defendants then and there and at the time duly excepted.

GEORGE A. LOCK, being called as a witness on behalf of the plaintiff testified as follows, to-wit:

Direct Examination by Mr. Freet.

Q. Mr. Lock, will you state your name? A. George A. Lock.

Q. What is your business, Mr. Lock? A. Life insurance.

Q. You are one of the general agents for the Fidelity Mutual Life Insurance Company here in Kansas City? A. I am.

Q. How long have you been? A. Twenty years.

Q. At my request, did you bring with you the American Mortality Experience Tables? A. I did.

Q. Have you it in your hand? A. I have.

Mr. Freet: I will introduce the table in evidence and have Mr. Lock give the age, date and days.

Mr. Lock: According to that table, attending the expectancy of life, of a man forty-two years of age?

Q. Forty-two years of age? A. Yes, sir.

Q. You may state the average of the life? A. That is twenty-six years and seventy-two one hundredths.

Q. Now, what would be the expectancy of life of a woman thirty-seven years of age—make it thirty-eight instead of thirty-seven? A. 29.62.

(Witness excused.)

Plaintiff offers in evidence the deposition of Albert Charles Gladson, taken October 30th, 1925 in the State Penitentiary of Lansing, Kansas, and the defendant offers in evidence the exhibits attached thereto, all of which is admitted in evidence as follows:

ALBERT CHARLES GLADSON, of lawful age, produced, sworn and examined as a witness on behalf of plaintiff herein, deposeth and saith:

Direct Examination by Mr. Talbert.

Q. State your full name? A. Albert Charles Gladson.

Q. What is your age? A. Twenty-four.

Q. You are now a prisoner in the State Penitentiary at Lansing, Kansas? A. Yes, sir.

Q. Where did you live before you were sent to this prison? A. 830 South Thirteenth Street, Kansas City, Kansas.

Q. Are you acquainted with a man by the name of Harry McCarthy? A. Yes, sir.

Q. Do you remember the occasion on which a man by the name of James Lee David, a train rider for the Missouri Pacific Railroad Company was killed at Leavenworth, Kansas? A. Yes, sir.

Q. Do you recall that that occurred about one-thirty A. M. on May 17, 1923? A. Yes, sir.

Q. Where were you the day before that, that is the day before this date on which James Lee David was killed? A. Why, most of the day we was waiting for a trial—Hogie Ward's trial up on Minnesota Avenue, Hutchinson's Court.

Q. That trial was taking place in the court of Judge Hutchinson in Kansas City, Kansas? A. Yes, sir.

Q. Were you attending the trial merely as a spectator? A. Spectator.

Q. What other persons attended that trial that you know? A. I couldn't—George Riley, Johnny Rock, Earl Gladson, Lawrence Hayes, Harry McCarthy, Ray Braynard—oh, there was numerous others, but I don't know just exactly who.

Q. On what charge was Hogie Ward being tried? A. Payroll holdup, Wilson & Company.

Q. Now, this trial of Hogie Ward's which you attended, as I understand you, took place

the day before the night on which David was killed, is that right? A. Yes, sir.

Q. During that trial, just state whether or not you had any conversation with Harry McCarthy in respect to robbing box cars of the Missouri Pacific Railroad Company at Leavenworth, Kansas? A. What do you mean?

Mr. Talbert: Read the question.

(Question read by the reporter.)

A. Yes, we had intention of coming up and robbing box cars that night.

Q. When did you first have any conversation with McCarthy in respect to that matter, what time that day, in the morning or at noon or in the afternoon or at night, or when? A. Along at noon.

Q. About noon of that day? A. Yes, sir.

Q. State whether or not any plan or arrangement was made at noon of that day, that is the day before the night on which David was killed, in respect to coming to Leavenworth, Kansas, to rob the freight train of the Missouri Pacific Railroad Company? A. Why, all the boys what belonged to the gang were supposed to go down to Riley's house right after the trial, meet down there.

Q. And then what was to be done? A. Then they was going to make arrangements, try to get two cars to come up, some of the boys didn't want to come up.

Q. When, in reference to noon the day before David was killed was it that the plan of coming to Leavenworth to rob the cars of the Missouri Pacific was definitely made? A. Why, it was out in front of the court room.

Q. About what time in reference to noon that day? A. It was during noon hour.

Q. If I understand you correctly, during the noon hour of the day before the night on which David was killed, this plan to come to Leavenworth, Kansas, and rob the freight cars of the Missouri Pacific Railroad Company was agreed upon? A. Yes, sir.

Q. Between what persons was that plan agreed upon? A. Why, several of the gang, me and Harry McCarthy and Lawrence Hayes and—let's see—Johnny Rock, Charlie Masterson, that is all I can recollect right now.

Q. Who was the leader in making the arrangement for this robbery of the Missouri Pacific at Leavenworth, if there was any leader?

Mr. Hackney: I object to the question as leading and suggestive.

Mr. Talbert: Let the question be withdrawn.

Q. Who first consulted you, if anyone, in respect to coming to Leavenworth that night to rob the train of the Missouri Pacific Railroad Company? A. Why, it came up in a conversation, McCarthy wanted some money for an appeal of some kind of case the Missouri Pacific had against him and he suggested that we all go up and rob some cars.

Q. Who suggested that? A. McCarthy.

Q. For what purpose? A. To get himself out of that case, an appeal bond he wanted, or something of that kind, I think it was for funds to fight his case, or something.

Q. Do you know whether or not McCarthy at that time had been convicted of any criminal

offense? A. Yes, he had been convicted of several at that time.

Q. I mean, you speak of some case that was then pending, what case was that? A. A case of the Missouri Pacific against him, that he had been already convicted in.

Q. You mean for robbing the train of the Missouri Pacific? A. Attempting to rob the Missouri Pacific.

Q. This case you refer to, was that case at that time pending in the Supreme Court? A. Yes, sir.

Q. Now, you say McCarthy was wanting to raise funds to take care of his appeal? A. To take care of his appeal, and I don't know what else.

Q. I understood you to testify that this plan of a gang, as you call them, these men you have mentioned, of coming to Leavenworth to rob box cars that night, I mean the night following the day on which this trial took place, was made about noon of that day? A. Along in the noon hour, yes.

Q. I believe you testified that David was killed about one-thirty, A. M., on May 17, 1923, did you not? A. Yes, sir.

Q. So that this trial, this Hogie Ward trial you have spoken of, it took place the day before it would have been May 16, 1923, is that correct? A. That is correct.

Q. What particular train of the Missouri Pacific Railroad Company was it the intention of you and the other men in this gang to rob that night, that is the night of May 16, 1923? A. Well,

there is special trains that carry cigarettes mostly, some of them go to St. Joe, and I don't know where all else they go, they mostly carry cigarettes, we were intending to get that one.

Q. Where did this train you were intending to rob, where did it start from? A. Start from—I don't know where.

Q. I don't mean what street address, but did it start from Kansas City, or some other place? A. Kansas City.

Q. Was it expected to pass through Leavenworth, Kansas? A. It stops there.

Q. And was it at Leavenworth, Kansas, where you expected the robbery to take place? A. Yes, sir.

Q. What time did you leave the court room that afternoon, that is the afternoon of May 16, 1923, what time did you leave the court room of Judge Hutchinson? A. Along about six o'clock in the evening.

Q. Who was with you when you left the court room? A. Why, I just don't remember, but there was two carloads of us, we all went down to Riley's house, I don't remember just who was in the cars.

Q. Who was the driver of the two cars? A. Lawrence Hayes was the driver of one and George Riley was the driver of the other.

Q. And where did you go to? A. To George Riley's home.

Q. Where was that located? A. South Coy Street, Kansas City, Kansas.

Q. In what is known as Armourdale? A. Yes.

Q. What was done, if anything, in furtherance of this plan to come to Leavenworth, Kansas, and rob the freight cars of the Missouri Pacific Railroad Company? A. Why, we consulted, all of us down there, and some of them didn't want to go, so who did want to go, it was I and McCarthy and Lawrence Hayes and Charles Masterson, four of us started and made it up to go that night.

Q. About what time was that? A. About six-thirty, or something like that.

Q. Six-thirty P. M., you mean? A. In the evening.

Q. Then what did you do? A. I had a date with a girl that night, so I wanted to go up and see and put it off and Charlie Masterson had to go to see the doctor, so Lawrence Hayes and McCarthy and I and Masterson went up to Wyandotte and I got off at Tenth and Central and Masterson went on up to the doctor's office, so I made a date with him to meet me as he was going back.

Q. Made a date with who? A. Lawrence Hayes and McCarthy.

Q. To meet you where? A. At Tenth and Central.

Q. Where were they going? A. To the doctor's office and then go down to see this freight go through and see what was on it.

Q. Where did they say they were going to see the freight, to what street or crossing? A. It foots there at Third and Minnesota.

Q. What was the purpose of going down to see the train as it went through? A. Why, mostly to see if there was any good merchandise on it.

Q. When did you next see McCarthy and Lawrence Hayes? A. I don't remember just what time it was, I think it was nine o'clock that day.

Q. Where did you meet them at that time? A. Tenth and Minnesota.

Q. Who was with them, if anyone? A. Just McCarthy and Lawrence Hayes.

Q. What was done then? A. We wanted another man, so we went down and got Red Loar out of his home.

Q. Is his full name Nathan Loar? A. Nathan Loar.

Q. Where was he living at that time? A. On South Fifth Street, Armourdale, he was in bed at the time.

Q. When you got down to Loar's house, what was done, if anything in respect to getting him to go with you? A. Well, all the lights was out and McCarthy got out of the car and went up on the porch and asked for Red and Red come out and got in the car.

Q. Then what was done? A. They started out and went up to my home, 830 South Thirteenth Street.

Q. From your home where did you go? A. Straight to Leavenworth.

Q. About what time did you arrive at Leavenworth? A. Oh, it must have been twelve or twelve-thirty, something like that, around twelve o'clock at night, I know.

Q. Around midnight? A. Yes, around midnight.

Q. Was this freight train, had it arrived at Leavenworth yet when you got here? A. No.

Q. I mean when you got to Leavenworth? A. No.

Q. Did you wait for it? A. Yes.

Q. Who all was in the party when you arrived at Leavenworth, Kansas? A. Lawrence Hayes, Harry McCarthy and Nathan Loar and Bert Gladson.

Q. That is yourself? A. Yes.

Q. In what part of Leavenworth did you wait for the train? A. I guess it is southeast.

Q. What? A. Leavenworth, the southeast part.

Q. About how far was that where you stopped your car from the track which this train came in on? A. About a block, a city block.

Q. How long did you wait for the train? A. Oh, we must have waited an hour or an hour and a half.

Q. When the train came in what was done? A. What do you mean, "what was done"?

Q. Well, did you—you said the train hadn't arrived when you stopped your automobile, I believe, and you waited about an hour and a half for it, is that right? A. Yes, sir.

Q. Well, when the train came in, what was done, if anything towards carrying out your plan and purpose of robbing the train? A. Why, McCarthy and I and Red Loar got out of the car and McCarthy and I went over to the railroad track and hopped on the train and went on down in the yards, the train stopped down there.

Q. What was your plan in respect to robbing this train? How were you going to get into the

freight cars? A. Why, McCarthy had an iron bar to get into the freight cars, a pinch bar.

Q. Commonly known as a pinch bar? A. Yes, sir.

Q. Were both you and McCarthy armed with firearms? A. Yes, sir.

Q. How long had you known this McCarthy prior to the time you came to Leavenworth with him? A. I had know him for ten years.

Q. Had you ever robbed freight cars with McCarthy at any time before this trip to Leavenworth, Kansas? A. Yes, several times.

Q. Just state where and on wlfat occasions you had robbed the cars with McCarthy, as nearly as you can remember? A. Why, one time was at Wolcott, Kansas, we robbed the Missouri Pacific, held up the train of cars.

Q. How long was that before this trip to Leavenworth? A. That was inside of a month of the time.

Q. About a month before? A. Well, it was in that time, I don't know just when it was.

Q. What other robberies have you taken part in in which McCarthy took a part? A. We robbed a Santa Fe freight train at Turner, Kansas, of some shoes and we robbed the Kansas City Terminal at Boeke—and I don't know what it is, South Boeke Street.

Q. Kansas City, Kansas? A. Yes, Armourdale—of a bunch of shoes. And then the Union Pacific at Mill Street in Armourdale, we robbed it.

Q. Had McCarthy, to your knowledge, ever served any time in prison? A. Yes, he served

under Charlie Masterson, alias Charlie Masterson, he served a term.

Q. Where? A. I am pretty sure it was Minnesota, I am not sure, I knew he done time.

Q. You spoke about the fact that McCarthy had been convicted for robbing the freight cars of the Missouri Pacific Railroad Company and his appeal was pending in the Supreme Court at the very time you came here to Leavenworth, do you know at what place he had robbed the Missouri Pacific, at what town? A. It was Atchison, supposed to be.

Q. Atchison, Kansas? A. Yes, sir.

Mr. Hackney: You say you supposed?

A. It was attempt, I think was what they convicted him on.

Mr. Talbert: You may inquire.

Cross Examination by Mr. Hackney.

Q. Do you remember testifying in the trial of Red Loar about the 11th of June, 1923, in the District Court of Leavenworth County, Kansas, when he was charged with participating in this killing of David? A. Yes.

Q. You remember testifying there on that occasion, do you? A. Yes, sir.

Q. Did you testify also when Hayes was tried? A. I never testified in Red Loar's trial, I testified in Hayes.

Q. Well, didn't you testify on the 11th day of June, 1923, in the trial of Red Loar either before the Magistrate or the District Court, do you remember that where Mr. Thompson was attorney for Red Loar—do you remember that? A. I don't remember testifying for Red Loar, at all.

Q. Let me refresh your recollection. A. I believe it is Hayes, because Red you know, Red didn't have no defense at all.

Q. Did you testify at the Hayes trial? A. Yes, I testified at the Hayes trial.

Q. Did you testify at your own trial? A. Yes, sir.

Q. Now, then, on the 11th day of June, 1923, didn't you testify in one of those cases either of Red Loar's or Hayes or of your own, in substance as I will read to you? Wasn't this question asked you and wasn't this answer given?

"Q. Mr. Gladson, how long have you known this man McCarthy? A. Known him for about two months.

Q. About two months? A. Yes, sir."

You remember that?

Q. You don't remember testifying to that? A. No, I don't. I remember that answer, I remember that question all right, but I don't remember the answer.

Q. Now, didn't you further testify on that occasion?

"Q. On the 16th day of May, what time did you see McCarthy that day?"

Didn't you answer: "A. Seen him around noon up at the District Court, Kansas City, Kansas."

Q. Do you remember making that statement? A. Yes.

Q. Now, then, do you remember making this further statement, I will read further from the deposition.

"Q. Did you leave there with him? A. I did not.

Q. When did you first see him that night? A. I seen him down at Riley's house, 1016 South Coy Street."

Q. Did you answer that question that way?

A. Read that over, please.

(Question read by counsel.)

A. What time did I see him down there you say?

Q. When did you first see him that night was the question, didn't you testify, didn't you make that answer? Then the next question:

"Q. What time did you go down to Riley's house? A. About six-fifteen."

Q. Did you make that answer? A. That six-fifteen is right, that is the first time in the evening.

Q. Then, further on, I will ask you if these questions were asked you and these answers given. "Q. Was he there at the time you got there, do you remember? "A. Yes, I believe he was. "Q. What time did you leave there? "A. It must have been close to seven o'clock. "Q. Who did you leave with? "A. With Lawrence Hayes and Harry McCarthy, Charlie Masterson and myself. "Q. Where did you go? "A. I asked Lawrence Hayes to take me to Tenth and Central. When we got up there I said, 'let me out at Tenth and Central.' I had a date with a girl up there. He drove up there and let me out." Do you remember making those statements?

Q. "Q. Was there any arrangement at that time made to meet them again? "A. No, there was not."

Q. I will ask you then if this next question wasn't asked and didn't you make this answer? "Q. When did you next see any of the party? "A. It was close around nine-thirty. I seen—I was waiting for a Tenth and Central Street car going to Armourdale and I seen Lawrence Hayes and Harry McCarthy coming along in his car. Harry McCarthy said, 'There is Bert; you might as well get in.' I got in and went down to Armourdale with them." Do you remember making that statement?

Q. Did you so testify? A. I remember making some kind of a statement that way.

Q. I will read the next question and the next answer. Wasn't this question asked and wasn't this answer given, "Q. Up to that time had there been anything said about a box car robbery? "A. There was not."

A. I don't remember.

Q. You don't remember making that? Then wasn't this question asked you and didn't you make this answer: "Q. Was there anything said at that time? "A. Well, yes, McCarthy says he and somebody else went down to Third and Minnesota, and they seen a freight going out. They got it in their heads to go and make it." Did you make that answer to that question?

A. Read that over again, please.

Q. "Q. Was there anything said at that time? That is the question by Mr. Thompson. "A. Well, yes; McCarthy says he and somebody else went down to Third and Minnesota, and they seen a freight going out. They got it in their heads to go and make it."

A. There was some kind of question, something about a freight train.

Q. And you made that answer to that question, didn't you? A. Yes, sir.

Q. "Q. Got in their heads to do what? "A. To go up and make that freight train." You made that answer to that question, didn't you?

A. Yes, sir.

Q. "Q. All right, what did they say to you, did they ask you, want you to go along? "A. McCarthy asked me if I wanted to go along."

Q. Did you make that answer? A. Just a minute, is that my testimony?

Q. Yes, that is your testimony from the court stenographer, what I am reading from. A. Yes.

Q. You made that answer, did you? A. Yes.

Q. Then, didn't also the attorney, Mr. Thompson, ask you the next question.

Q. (Mr. Hackney) Wasn't this question asked and this answer given: "Q. What did you tell him? "A. I told him, 'Anything was good enough for him was good enough for me.'" Did you make that answer to that question?

Mr. Talbert: I object to the question as being an improper method of cross examination.

A. Yes, sir.

Q. You made that answer. What is your recollection now about your testifying as I have asked you, that you had no arrangement to go and rob a Missouri Pacific box car, or any other box car until that night after nine-thirty, and when you said McCarthy said he and someone saw a train there at Third and Minnesota?

Q. What is your recollection now? A. Why, we had intentions at noon of going up to Leavenworth.

Q. To rob any particular train? A. Why, most generally get the best merchandise train there about one-thirty in the morning.

Q. But you hadn't any intention at the trial of robbing any particular train?

Mr. Talbert: I object to the question, the witness having already testified that he did have an intention of robbing a Missouri Pacific train and the plan was made at noon.

Q. What do you say now? A. I don't remember.

Q. You don't remember about your testimony or what the facts was at that time?

Mr. Talbert: What is the question?

Q. I say, now after reading your testimony, what do you say about whether or not your testimony then was correct, or whether it is correct today?

Mr. Talbert: I object to the question as being an improper method of cross examination, the witness already having testified on that matter, it being repetition.

A. I don't remember that question.

Q. Don't you know that was in substance your testimony on each of those times when you testified in that trial of yourself or either of those other parties charged with you in the commission of that crime?

Mr. Talbert: I object to the question as being repetition.

Q. What do you say? A. I don't remember that question.

Q. Now, then you remember also on cross examination by Mr. Bond that you testified in each of those cases, do you not, do you remember that? A. Do I remember Mr. Bond's question?

Q. Do you remember testifying on cross examination, after Mr. Thompson examined you?

Mr. Talbert: In which case?

Q. In the Red Loar case and in the Hayes case and also in your own case? A. I didn't testify in Loar's case, I testified in Lawrence Hayes' case and myself.

Q. Well, the records show you testified in Red Loar's case. A. I reckon it must be wrong, there was no defense in Red's case.

Q. In the testimony you gave at Leavenworth, when you did testify on behalf of one of your co-defendants, didn't you say that you had no plan to rob any car, but that McCarthy had told you he was a railroad bull and he decided to go up there and wanted you to go with him to this railroad car where the riders were and he would show you that he was a railroad bull?

Mr. Talbert: I object to the question, because the alleged statement is not shown to the witness and it is not identified what trial this statement was made in.

A. I don't remember the question.

Mr. Talbert: And there is no showing that the paper the attorney is reading from is an authentic copy.

Q. What do you say about that question? A. I don't remember.

Q. Don't you remember Mr. Thompson on direct examination asked you the question about

what McCarthy said, and didn't you testify in answer to his question, state what they said, you said: "A. * * * Harry McCarthy said, 'I am a railroad bull' he said, 'Come on, I will make you fellows rich.' He said, 'Come on.' The three of us finally said, 'We ain't going with you, you are a dope user.' " Did you make that answer?

Q. (Mr. Hackney) You don't remember that? A. No.

Q. You don't remember saying that McCarthy said that he was a railroad bull and that if you would go down there he would show you? A. I don't remember that question.

Q. You don't remember that? Who has talked with you since you were convicted?

Mr. Talbert: I object to the question as being too general, about what?

Q. About this matter, the circumstances of the shooting of David. A. Why, nobody I know of.

Q. Haven't you ever talked to anybody at all? A. Why not specially about that matter, no.

Q. Didn't you tell the officers when you were arrested, when you were first asked to make a statement, that you had no plan to go and rob the car until after nine-thirty that night?

Mr. Talbert: What officers do you refer to?

Q. The officers that arrested him and had him in custody? A. I didn't tell no officers nothing.

Q. Didn't you tell them anything? A. No, sir.

Q. Weren't you asked by the officers that arrested you what occurred? A. Well, I may have been asked, but I didn't tell them nothing.

Q. Do you remember when and where you were arrested? A. Yes.

Q. Where were you taken from the place of the arrest? A. Charlie Thompson's, lawyer's office.

Q. Taken to Thompson's office after you were arrested? A. I was arrested in Thompson's office.

Q. Then you came to Leavenworth with him, did you not? A. No, went to the City Hall, Kansas City, Kansas, and the Leavenworth officers came down and brought me to Leavenworth.

Q. Then, you were taken before the magistrate at Leavenworth, were you not? A. Yes.

Q. When were you taken there, the 11th day of June? A. I don't remember, I believe it was in May.

Q. Well, it was about a month, was it the next day after the hearing, I mean the next day after the killing, or was it a month after? A. No, it wasn't the next day, it was several days after.

Q. It was several weeks after David was killed before the preliminary hearing was had? A. Several days, it wasn't several weeks.

Q. And how many times did you testify before the magistrate? A. What magistrate?

Q. The committing magistrate here that bound over all of you boys? A. We never testified.

Q. Didn't you testify up there? A. No.

Q. How long was it before you and Hayes and Loar were tried in the District Court? A. From May 19th up to June 8th, when I got my time.

Q. June 11th was when Red Loar or Hays was tried, wasn't it? A. Along about the 11th.

Q. You say you didn't testify in the Magistrate's Court? A. No.

Q. But you did testify in the District Court? A. Yes.

Q. Which one of the boys was tried first? A. I was.

Q. You were tried first and you testified then in your own behalf, did you not? A. Yes.

Q. Then, who was tried next? A. Lawrence Hayes.

Q. And you testified in Hayes' case? A. Yes.

Q. You were tried about the 8th, were you not? A. I think it was the 7th and 8th.

Q. And Lawrence Hayes was tried about the 11th of June? A. Along about that time.

Q. And you say Red Loar wasn't tried? A. Yes, he was tried after that.

Q. How long after? A. About a couple of days.

Q. You didn't testify at Red Loar's trial? A. No.

Q. I will ask you to take this document which I now present to you and look at pages 1 to 42 inclusive and look it over and I will ask you if that isn't a correct report of the testimony that you gave and of the questions that were asked you on the trial in the District Court of Lawrence Hayes.

Q. Look over it, any part you want to, and answer the question, you can take your time and look it all through if you want to. A. All I can say is—

Q. (interrupting) I will ask you then, if you don't know what to say, to look over the deposition and state if you didn't testify as it is there reported and indicated on the question of when you first arranged to go to Leavenworth with a view of robbing box cars?

Q. (Mr. Hackney) In view of the objections made by counsel, I will call your attention to the part of the transcript of the testimony where you are inquired of as to your knowledge of McCarthy's and your arrangements that night and when you made your arrangement to go and rob box cars; it commences on page 3, goes on page 4 and page 5 and up to the top of page 6. Just read those and see if that isn't the way you testified.

Q. (Mr. Hackney) Just take your time and read it over, Bert, those pages 3, 4, 5 and 6 and see if that isn't the way you testified on that subject?

A. All I can say to this is I remember some of the questions, some of them are right, others I don't remember.

Q. Do you remember that part that you said you had no plan of robbing box cars before nine-thirty that night?

Q. (Mr. Hackney) What do you say now after refreshing your memory there? A. I don't remember.

Q. Now, then how many times have you been in the penitentiary? A. This is my—I was in the Missouri penitentiary, and this one.

Q. When were you convicted and sent to the Missouri penitentiary? A. In 1920.

Q. On what offense? A. For stealing some shoes from the Milwaukee freight house.

Q. Out of Milwaukee and St. Paul? A. Yes.

Q. How long a time were you sent to the penitentiary for that? A. Two years.

Q. Did you serve your term? A. Yes, sir.

Q. You were convicted at Osawatomie, Kansas, for shooting some man, were you not? A. No, I was convicted at Paola.

Q. At Paola, I should have said, for shooting at Osawatomie, did you serve your time for that? A. No, I was out on appeal bond.

Q. You were out on appeal bond when you were convicted for this offense and sent over here, were you not? A. Yes, sir.

Q. And your conviction for this case was for how long, what was your sentence for this conviction? A. Life.

Q. I asked you awhile ago if you had been convicted and given a sentence of ten years for that case at Paola, Kansas, had you not? A. Yes, sir.

Q. I asked you awhile ago about talks you had had with anybody about the circumstances on which you and McCarty came to Leavenworth on this night in question when did you first talk with anybody after you came here, any outsider? A. I have talked to my mother all along.

Q. Have you had any letters from anybody? A. No.

Q. Have you written any letters to anybody on the subject? A. No.

Q. Have you made any signed statement to anybody? A. No.

Q. Have you been requested to make statements to anybody? A. Not up to this time.

Q. When did you first talk to Mr. Talbert? A. Why, when did I first talk to him?

Q. Yes, the first conversation you had on this subject? A. This morning.

Q. Did you ever see him before? A. Yes, I have seen him over in Missouri, several times.

Q. Have visits with him? A. No.

Q. Have any conversation with him? A. No.

Q. No talk with him at all? A. No.

Q. How did you come to know him? A. Why, I have known him as an attorney.

Q. Under what circumstances did you get acquainted with him? A. I am not acquainted with him, just knew of him.

Q. You just knew him by sight? A. Yes, sir.

Q. Have you talked with Loar and Hayes about the matter? A. About our case up here in Leavenworth?

Q. Yes. A. Yes.

Q. Talked to them since you have been convicted? A. Yes.

Q. And as to when you had this arrangement with McCarthy? A. When we had what arrangement?

Q. To rob this Missouri Pacific train? A. Not especially that, no, because we all know about it, everybody in the bunch knows about it.

Q. You boys haven't talked very much about it, have you? A. We talked about our time, yes.

Q. Let me get it again, I understand you were all over at the trial of Hogie Ward, these parties

you have mentioned here over there at that trial of Ward, were you not? A. Yes, sir.

Q. It was what you called the gang, is that right? A. Yes, sir.

Q. And how many were in that bunch? A. Eight or ten or more.

Q. And you say it was then that you and McCarthy got to talking? A. Yes, up on Minnesota Avenue at that trial.

Q. And you didn't arrange to rob any particular train at that time, did you? A. We arranged to rob some trains up at Leavenworth, yes.

Q. When? A. That night.

Q. You arranged to rob some train at Leavenworth that night, you had that plan with him then? A. When?

Q. You had that plan made that day, did you? A. Yes.

Q. Why didn't you so testify previously? A. I don't remember whether it was asked me or not.

Q. Isn't this the first time you have ever testified anywhere, or told any person in the court room that you had this plan made during the day before nine-thirty o'clock that night to rob these Missouri Pacific cars, isn't this the first time you have testified on this subject when you have said this occurred prior to nine-thirty? A. I don't remember.

Q. Can you remember any time or place when you told any person before this testimony today that you and McCarthy had this plan prior to nine-thirty that night? A. I don't remember.

Q. You don't remember of it. Can you tell me whether you ever told anybody in court or out of court that this thing occurred prior to nine-thirty that night? A. I don't remembre.

Q. Did anybody ever ask you the question, excepting Mr. Thompson, as I read a little while ago as to when this agreement was made to rob box cars?

Q. I mean, besides Mr. Talbert here. A. I don't remember.

Q. You don't remember any other occasion besides when Mr. Talbert asked you the question as a witness, what time this arrangement to rob box cars was made between you and McCarthy? A. I don't remember anybody ever asking me about it.

Q. Did anybody ever make any suggestion to you as to when this agreement was made? A. I don't remember.

Q. You don't remember—that is the best answer you can give for it?

Q. What do you say? A. I don't remember.

Q. How many times have you been arrested?

Q. I will get at that. How many times have you been arrested? A. I don't know, four or five.

Q. Not more than that? A. Not as I remember right now, it is not any more than that.

Q. Were you arrested for the Wolcott robbery? A. No.

Q. You say that was shortly before the killing of David? A. Yes.

Q. About how long, along inside of a month, how long would you say now that you have known McCarthy? A. I have known him about ten years.

Q. Where did you get acquainted with him first? A. In Armourdale.

Q. And you have been in how many robberies with him? A. Several.

Q. Well, how many do you say, you were asked about it, how many were they all told? A. You want me to name them?

Q. About how many were there altogether —I believe you only named box car robberies before. A. Why, there was several of them.

Q. Were they any pay-roll robberies? A. One.

Q. What was that? A. American Express.

Q. Who else was in that? A. McCarthy was in it.

Q. Well, who else? A. The rest of them are still out.

Q. Who are they? A. No convictions on them.

Q. Who are they? A. I can't afford to tell.

Q. You can't afford to tell? A. Some of them are still out.

Q. Well that isn't any particlar reason, is it for not giving the names? Where was that robbery you speak of? A. In the West Bottoms, Kansas City, Missouri.

Q. About what time? A. Why, it wasn't such a long time before this killing up here.

Q. Well, about how long? A. Couldn't have been over a month before.

Q. I will ask you again to give us the others' names besides yourself and McCarthy.

Q. (Mr. Hackney) Are you trying to protect some of your pals? A. Yes.

Q. You and Loar and Hayes got very angry at McCarthy for turning you in on this matter, didn't you? A. No, not especially.

Q. You don't feel very kindly toward McCarthy, do you? A. No, I am not in love with him, but I have no personal grudge against him.

Q. He testified against you, didn't he? A. Yes.

Q. And that angered you, didn't it? A. No, couldn't call it anger, I didn't like it, couldn't call it anger though.

Q. And so you are wanting to say anything ugly you can against McCarthy today, aren't you? A. No, not especially, just tell what I know.

Q. And is your memory any better now than it was two years ago? A. No.

Q. The memory as to when you first had your arrangement with McCarthy on the date of David's killing was better then than it is now, wasn't it.

Q. (Mr. Hackney) What do you say? A. Just the same.

Q. Just the same then as it is now. Did you have any reason on the trial before to state the matter any differently from what you have done today? A. No.

Q. You remember testifying on the trial of Hayes and also on yours, that McCarthy had

a bottle of cocaine and took some of it that night? A. Yes, sir.

Q. You did testify to that, did you? A. I recollect something about testifying something about that.

Q. And you said after he took the cocaine he jumped around like a crazy man. A. I disremember what it was.

Q. You don't remember what you said about that? A. No, I disremember.

Q. That he claimed he was a railroad bull and "I will show you if you will go with me over to Leavenworth?" A. I don't remember.

Q. You don't remember him saying that? A. No.

Mr. Hackney: I will ask that the testimony I have shown the witness be identified by the reporter and attached as part of his deposition.

(Said document so offered in evidence by the defendant was at the time duly marked "Defendant's Exhibit 1" and is attached hereto and made a part of these depositions and is as follows):

BERT GLADSON, the defendant herein, having been first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. State your name to the court? A. Albert C. Gladson.

Q. Where do you live? A. 831 South Third Street, Kansas City, Kansas.

Q. How old are you? A. Twenty-two years old.

Q. Twenty-two? A. Yes.

Q. Along in 1920 or 1921 you were arrested and sentenced to the penitentiary in the State of Missouri? A. Yes, sir.

Q. How long did you serve down there? A. Eleven and a half months.

Q. What had been your business prior to that time? A. I was time keeper for Swift and Company for fifteen months, just before that I was time keeper for and checker for Cudahy and Company for 18 months, and clerk and mail clerk for Avery and Company in the west bottoms for three years.

Q. When were you released from the penitentiary at Jefferson City? A. August 6th, 1921.

Q. You were also arrested in Paola or tried in Paola? A. Yes, sir.

Q. For assault with intent to kill down there? A. Yes, sir.

Q. At that time as I understand were shot with two loads of buckshot and two bullets went through you? A. I was.

Q. Three juries were empanneled for you down there, one mistrial and one hung jury, and you were finally convicted and the case is now in the Supreme Court? A. Yes, sir.

Q. Your testimony down there at that trial was that you did not have a revolver? A. It was.

Q. Mr. Gladson, how long have you known this man, McCarthy? A. Known him for about two months.

Q. About two months? A. Yes, sir.

Q. Under what circumstances did you get acquainted with him? A. Why, he came over and wanted me to rob box cars with him.

Q. How many different box car robberies do you know of his having perpetrated? A. Well, I know he tore up the Rock Island railroad from 18th Street plumb to Mill Street, sixty or 80 cars and carried away six cases of shoes from the Kansas City Terminal; carried away four cases of shoes from the Santa Fe; and shot the Union Pacific detective on Mill Street in Kansas City, Kansas.

Q. Who shot the detective there? A. Harry McCarthy.

Q. Do you know where he disposed of some of that stuff? A. I do.

Q. Do you know where he tried to sell the 12 cases of shoes? A. I do.

Q. Where did he try to sell those 12 cases of shoes? A. At Packard and Osage, Myron Kauffman's, something like that. Right on the corner, the clothing store, the fellow upon the witness stand.

Q. Upon the 16th day of June, what time did you first see McCarthy that day? A. 16th of June?

Q. Well, the 16th day of May, I beg your pardon. A. Seen him around noon up at the district court, Kansas City, Kansas.

Q. Did you leave there with him? A. I did not.

Q. When did you first see him that night? A. I seen him down at Riley's house 1016 South Coy Street.

Q. What time did you go down to Riley's house? A. About six fifteen.

Q. Was he there at the time you got there, do you remember? A. Yes, I believe he was.

Q. What time did you leave there? A. It must have been close to seven o'clock.

Q. Who did you leave with? A. With Lawrence Hayes, and Harry McCarthy, Charley Masterson and myself.

Q. Where did you go? A. I asked Lawrence Hayes to take me to 10th and Central. When we got up there I said, "Let me out at 10th and Central." I had a date with a girl up there. He drove up there and let me out.

Q. Was there any arrangement at that time made to meet them again? A. No, there was not.

Q. When did you next see any of the party? A. It was close around 9:30. I seen—I was waiting for a 10th and Central street car going to Armourdale and I seen Lawrence Hayes and Harry McCarthy coming along in his car. Harry McCarthy said, "There is Bert; you might as well get in." I got in and went down to Armourdale with them.

Q. Up to that time had there been anything said about a box car robbery? A. There was not.

Q. Was there anything said at that time? A. Well, yes, McCarthy says he and somebody else went down to Third and Minnesota, and they seen a freight going out. They got it in their head to go and make it.

Q. Got it in their head to what? A. To go up and make that freight train.

Q. All right, what did they say to you, did they ask you—want you to go along? A. McCarthy asked me if I wanted to go along.

Q. What did you tell him? A. I told him, "anything was good enough for him was good enough for me."

Q. All right, then what did you do? A. McCarthy said, we better get Red Loar to go.

Q. Who said that? A. McCarthy said that, so they went on down. McCarthy went upon the front porch and went in the house.

Q. Now, about what time of night was that? A. Oh, that must have been fifteen minutes to ten.

Q. Now, do you know whether or not Loar was in bed? A. Well, somebody hollered out to me and Hays, in the car; somebody hollered out, he was in bed, that he would be out in just a minute.

Q. Where did he go? A. To my house down on South 3rd.

Q. What did you go to your house for? A. To get some guns.

Q. Some what? A. Guns.

Q. Did you get any guns there? A. I did.

Q. What two guns did you get? A. I got one 44 Smith and Wesson, one 45 Colts automatic and a jacket.

Q. Now, what did you do with the guns? A. Put them inside of the pocket in the car.

Q. From there where did you go? A. We went up to Leavenworth; started to Leavenworth.

Q. What did you say? A. We went to Leavenworth; it is this way. I never been out here before; they said they were going to Leavenworth.

Q. Now at that time—as you came along do you know whether or not anybody threw a flashlight in your car? A. Not to my knowledge.

Q. Do you know where you turn on to the rock road? A. I do.

Q. Did your car come anywhere near upsetting there? A. I did not.

Q. Did you pass any car at that point? A. We did not.

Q. From there where did you go? A. Straight out that road as far as I know; that pavement road, kept on following it.

Q. Where did you go to? A. We ended up here at Leavenworth.

Q. Now, Mr. Gladson, I will ask you when you were to leave the yards down there how did you come out of there? A. What yards?

Q. Well, you sat in the car down here somewhere, you do not know where it was? A. Down here somewhere.

Q. How long did you stay in your car? A. Well, we set there fifteen or twenty minutes then.

Q. Now was there—

Mr. Bond: Let him finish, then what?

A. We set there fifteen or twenty minutes.

Q. What transpired down there? A. Why, there was nothing right then. About two or three minutes we seen a car coming.

Q. What do you mean, an automobile? A. An automobile come down the same street, so we started the car up and went around a ways and come back to the same place in ten minutes later.

Q. How long did you stay there? A. That time we just stayed there, oh, it must have been three-quarters of an hour or an hour in that one place.

Q. Did you go down into the yards? A. What yards?

Q. Did you go down where the railroad tracks are? A. I did after while, yes.

Q. Did Nathan Loar and Hayes go down there? A. No, sir.

Q. You know why they did not go down there? A. Yes, sir.

Q. Tell the jury why they did not go down there? A. Well, just, we heard the train whistle, somebody said, "That must be the Mop coming up." That is the way they call the Missouri Pacific, said, "The Mop." About that time well McCarthy he pulled out a little old bottle about that big with white stuff in it and said, "You fellows want a shot?" Somebody in the crowd asked him what it was. He said, "Cocaine." Everybody declined. He said, "I am going to take a couple of sniffs myself." Anyway he took a couple of sniffs and he put the bottle back and I do not know what kind of stuff it was. Red, Hayes and myself—a little while after Harry McCarthy said, "I am a railroad bull." He said, "Come on, I will make you fellows rich." He said, "Come on." The three of us finally said, "We ain't going with you, you are a dope user."

Q. Why did you object to going with a dope user? A. Well, they are liable to shoot somebody and blame it on to you or anybody else. You cannot tell what cocaine fellows will do; these men don't know what they are doing, neither do we.

Q. So Loar, and Hayes refused to go with him at all? A. They did. I did at first myself.

Q. How did you happen to go down there with him? A. McCarthy kept jumping around. He says, "I will go down there myself; I will show you fellows something." Red and Lawrence said, "Go jump into the river." I did not know,

so presently I said, "I will go with you and see if you mean it." "See if you mean it." He said, "I will go down there and see a railroad detective down there and show you I am a bull—I am a railroad detective; they cannot do nothing to nobody anyway." I said, "All right, go ahead, I want to see whether you are a railroad detective or not, I don't believe you."

Q. Just tell what happened, all that he and you said. By the way, at the time you left you said you put two revolvers in the pockets of your car? A. Yes.

Q. Were they taken out? A. They were.

Q. When were they taken out? A. Before ever we left the car after McCarthy took this white stuff, I do not know what it was. He says, got all spoofy, jumped down in the car. There was a flashlight and crowbar in the bottom of the car. He got that out and put it in his pocket. The flashlight resembled this one here. I do not know whether it is or not. He said, "Give me that big long pistol." He said, "I cannot shoot this other pistol." He took this Smith and Wesson pistol out. He said, "I cannot use this other because I got one finger off." He said, "I cannot work it right."

Q. What was the 45? A. The 45 was the Colt's automatic.

Q. Was that more difficult to work than the ordinary revolver? A. It was two or three obstructions with safeties and things you have to work before you can shoot.

Q. So which one of the revolvers did he have? A. He had the 44 Smith and Wesson.

Q. Just tell the jury from that time on what happened when you got down there. A. Well, after he got this stuff up there he got this crowbar we got out of the car. He said, "Come on you fellows." Nobody would go but myself, so I went with him after that. I went right over and we caught this freight train just pulling out. It stopped before. We got the freight train and rode down, I do not know three quarters of a mile or half a mile and then it stops, so he says, "Come on" and jumped off the train and started walking back, walked back for, he must have walked back three or four cars. We seen somebody—

Q. Just a minute, Bert. As I understand you went down there with him, he was going to take you to one of these railroad policemen and show you who he was? A. He was going to identify himself as a railroad bull. I did not believe him.

Q. Was that why you went down there with him at that time? A. It was.

Q. All right, go ahead. A. When the train stopped why me and him, we got off. He said, "Come on." While walking back so we could find one of these fellows on that train he was going to meet. We were walking back there at that time, we were still on the other side of the car. He said, "That ain't nobody but a bum." He said, "Let's go on down." He said, "I don't see anybody, let's get on the other side." We got on the other side, but before we got there he got on top of a bumper and I went underneath. I got on the other side and I looked up and down.

I did not see anybody. He was still up there. I said, "I don't see anyone coming on this side; we might as well go back." About that time somebody put a flashlight on us.

Q. What happened? A. Well, when he put this flashlight on us I could not see McCarthy then because McCarthy was between the cars and I was standing on the ground. He said, "Come over here." He said, "Come over here on this side," so I said, "Well, I did not know, I did not believe I wanted to go over on the other side," so I started to running. About that time I heard two shots. Somebody hollered, "Oh! oh!" I ran down beside of the cars and pretty soon right after me why comes McCarthy. He said, "Get over between the cars, get underneath," so we got over. I run up the side of the cliff and I got almost to the side of the cliff and somebody put a flashlight on me and I kept running, and he started shooting, and I heard him shoot in back of me and I run up the cliff.

Q. Now, Gladson, you had on a jacket? A. I did.

Q. Did you throw it away that night? A. I did.

Q. What for? A. It was cumbersome and I did not want it along.

Q. You were in a hurry to get away? A. I was.

Q. Did you find Hayes' car? A. Well, first before we ever found the car—

Q. Let me ask you a question. Did you ever drive an automobile in your life Bart? A. Well,

I drove once, yes, once; but I did not know how to drive.

Q. Can you drive an automobile? A. I cannot, no, without running into telephone poles.

Q. What is that? A. A fellow let me drive his car and I run it into a telephone pole.

Q. That is the only time you ever tried to drive one? A. That is the only time.

Q. Did you and McCarthy try to do anything that night with any cars? A. Yes.

Q. What? A. I walked, we came thru a yard first and walked up the street must have been a block and a half from the bluff and McCarthy says, "Let's try to steal this car," and I says, "I do not know whether we can do it or not; I cannot drive no car." He got in and worked around a little bit on it. He says, "It ain't going." So he got out again. It rolled down the street a little ways. We went down and tried another car, a Ford of some kind. It would not start so we walked on up the street over to back, over where we thought Hayes' car was.

Q. Now, did he make any statement to you about whether or not he had shot the man? A. After he got in the back end of the car and we started to Kansas City.

Q. Where were you sitting front or back seat? A. I was in the back seat.

Q. Where was McCarthy? A. McCarthy was right beside of me.

Q. In the back seat? A. Yes.

Q. Now, just tell the jury what conversation if any, you had with him at that time. A. Well, he says, "If I bumped this bull off down—"

Q. What is that? A. —"That makes three I have killed."

Q. Did he tell you who the three were? A. He said a New Orleans policeman; McDonald from Kansas City.

Q. Did he tell you the name of the New Orleans policeman he had killed? A. No, he did not say.

Q. Up to that time did you have any intimation of the fact he had killed McDonald? A. I did not.

Q. Did he tell you why he had killed McDonald? A. No, he just mentioned it; he said, "That makes three on my list now, if I bumped off this one."

Q. Now, when you got in the car where did you come? A. Came to Kansas City.

Q. And where did you go to? A. I went home.

Q. Were you the first one to get out of the car? A. No, McCarthy was the first one out of the car.

Q. Where did McCarthy get out? A. The end of the Argentine street car line.

Q. Did he get out and take the street car? A. I do not know what he got out to take; I guess he did. He said, "Let me out here."

Q. Now, Bert, how long was it after this expedition at Leavenworth, that you knew that you were wanted in connection with the killing here? A. How long after the expedition to Leavenworth?

Q. How long after the killing of McDonald (David) on the 17th; how long after that was it you knew that the authorities were looking for you? A. On the 19th, Saturday.

Q. Saturday. Just tell the jury how you found it out? A. Well, Freddie Thompson told me first. He says, "They are looking for you for something." I says, "Well, if they are doing that I am going up to see Mr. Thompson and turn in on my bond." So I called up Mr. Thompson's office—Charley Thompson.

Q. When you got to my office you and Mr. Loar got there, you were each out on $5,000 bond? A. Yes, sir.

Q. What did I tell you at that time I wished to do with you? A. To turn me in on this appeal bond.

Q. How long did you stay in my office, about two or three hours? A. Well, we had to wait for Mr. Loar, he did not come up at the same time.

Q. Then you were surrendered to Robert Darnell and Ruddie Marker, two officers upon your bond? A. Yes, sir.

Q. Now, is there anything else in connection with this matter you want to tell the jury about? A. I do not know, unless it would be I did not say, when I got to the top of this cliff there I kind of slowed down and McCarthy emptied his gun up there and reloaded.

Q. You mean when you got on top of the cliff he took the shells out of the gun? A. He did and reloaded.

Q. That is all. You may take the witness.

Cross Examination by Mr. Bond.

Q. In other words McCarthy's testimony was all the truth except when it came to the shooting; he did the shooting instead of you, and he reloaded

his gun on top of the hill instead of you? A. No, sir.

Q. The principal points are about the same you have testified to? A. No, the principal points are not the same.

Q. Aren't they, well, let's see young man. You say you are how old? A. Twenty-two years old.

Q. Twenty-three? A. Twenty-two.

Mr. Thompson: Twenty-two.

Q. Twenty-two. How many times have you been arrested? A. Oh, about three times.

Q. How? A. About three times.

Q. Three? A. Three or four.

Q. Three or four? A. Not many more.

Q. Any more than four? A. No, sir, not as I can recollect.

Q. Well, let's see, can you remember how many times you have been arrested? A. Yes, I can remember.

Q. Well, now, let's see what were those four times you were arrested?

Mr. Thompson: Just a minute. I object to the question as immaterial.

The Court: I think it is proper.

Mr. Kelsey: Conviction is what counts.

Mr. Bond: I thought that until I went to the Supreme Court in a case too.

Q. You have been arrested four times, you say? A. Three or four.

Q. When was the first time? A. I do not remember.

Q. You do not remember the first time you were ever arrested in your life. Now, just wait

a minute. Young man, you realize that you have been sworn here to tell the truth? A. I am.

Q. The whole truth? A. I am.

Q. You want to tell the truth and you cannot remember the first time you were arrested in your life? A. I could not remember the exact date the first time I was arrested.

Q. Where was it? A. Kansas City.

Q. What for? A. Oh, I think for throwing snowballs.

Q. For throwing snowballs; how old were you; that is one time? A. Fifteen or sixteen years old.

Q. All right; what was the second time? A. I believe it was in 1919.

Q. For what? A. For grand larceny.

Q. For grand larceny; where was that? A. Kansas City, Missouri.

Q. Kansas City, Missouri, grand larceny of what? A. Grand larceny.

Q. I know, what was it you were stealing? A. I was not stealing.

Mr. Thompson: I object to the question as immaterial.

Q. It is preliminary. Weren't you arrested and convicted and sentenced to the penitentiary for larceny from a freight depot having stolen seven cases of shoes from the Chicago, Milwaukee and St. Paul, or is that a mistake? A. That is the one I just told you I done eleven and a half months for.

Q. That is the one? A. That is the one.

Q. That is the Lansing term? A. Yes, sir, Lansing.

Q. That is the second time; now the third time when was that? A. Oh, about, whenever it was; it was in April, 1922, I believe.

Q. 1922 in April, what was it for? A. Down at Paola, Kansas.

Q. Paola, Kansas. That was the time that you were arrested down there for robbing the Missouri Pacific? A. No.

Q. Freight? A. No.

Mr. Thompson: Just a minute. It is proper for counsel to ask him how many times he has been arrested, but it is not proper for counsel to cross examine him as to why he was arrested and the circumstances surrounding the arrest. When he says he was arrested that concludes counsel's questions on that point.

Mr. Bond: I have an absolute right to show what he was convicted for. I will ask you if you were arrested for robbing a freight train of the Missouri Pacific, and at the time you were arrested if you or your companion Loar, this Red Loar here, did not shoot this man in the breast and it came out the back, and through the legs at that time? A. I did not; I did not rob no box car.

Q. What were you doing? A. I was doing nothing.

Q. What?

Mr. Thompson: Just tell where you were.

A. I was down to the City of Osawatomie and this fellow standing up and another fellow tried

to steal a truck of ours, and Red Loar shot this fellow.

Q. And that is what you have gotten ten years in the Kansas Penitentiary? A. I am not in there yet, I am out on appeal.

Q. This appeal is set for tomorrow morning, you have never filed an abstract or brief of your case? A. We have time yet.

Q. That is the case on which you are out on $5,000 bond signed by Mr. Thompson, you and Red Loar? A. He did not sign.

Q. You gave your testimony in that? A. Yes.

Q. That is your third time; when was the next time you were arrested, the fourth time? A. I was picked up on the American Express hold-up in Kansas City, Kansas.

Q. That is the American man who sat there and said you were the one who robbed it; is that the time? A. One he thought.

Q. Did he say he thought you were the man, or did he say you were the man? A. I understood him to say, "He thought."

Q. You understood. That is a good understanding. Don't you know Mr. Thompson asked the witness, the first man in here, who helped in that robbery? A. Yes.

Mr. Thompson: I object to that as not cross examination. I did not ask this witness anything about that.

Q. You were arrested on this American Express Robbery that Mr. Wisenberg testified to; that was the fourth time. Is that all? A. Only this last one.

Q. This is number five then. Is there any charge in Missouri against you now? A. Not as I know of.

Q. You have fought requisition issued from Missouri? A. I have not.

Q. You do not know of any requisition out from Missouri for you? A. No, sir.

Q. Were you arrested in Ottumwa, Iowa, at some cabin well armed up there and turned over to the Kansas authorities? A. That is the same one you just told about.

Q. That is that one? A. I was not well armed or nothing of the kind.

Q. You were not well armed? A. No, sir.

Q. You say this night there at Kansas City they came to you—I don't remember these names—and they suggested you go up here and rob a freight train? A. McCarthy did.

Q. McCarthy. You said, "Whatever is good enough for you is good enough for me?" A. I did.

Q. You came on? A. I did.

Q. Yes, and in some way, he suggested that you come, McCarthy suggested it, did he? A. Yes.

Q. Did McCarthy suggest Red Loar go along and help? A. I do not know that.

Q. So he did not do that; it was you suggested to get Red Loar? A. I know he said something about McCarthy.

Q. Oh, yes, he did say something about McCarthy. A. No, I did not. He did.

Q. Oh, yes. Who then got in this automobile and drove up here? A. Hayes.

Q. You had never been up to Leavenworth? A. I had not.

Q. Had Hayes? A. I do not know.

Q. Who was it knew how to get up here?

Mr. Thompson: I object to the question as immaterial.

Q. You did not just drop down here did you from the clouds? A. It was not me.

Q. You had never been up here? A. I had not.

Q. You sat in the automobile and they finally drove you and landed you some place near the railroad, is that it? A. They did.

Q. But before you left Kansas City, did McCarthy make you stop and get this 44 and 45? A. He asked me to.

Q. Who was it, you or McCarthy? A. One was for him.

Q. Who was the other for? A. Somebody else.

Q. Who took the other? A. I did at last.

Q. You did at last. He forced you to take it tho, did he not? A. He did not.

Q. But you really finally did take it? A. I did.

Q. You took a jacket from your house; that is the jacket? A. One like it.

Q. One like it; then you come on to Leavenworth and you stopped down here at the railroad tracks: then you saw an automobile and you drove around for a while and came back again; is that it? A. The car was driven around; I was in it.

Q. You did not drive the car; whoever was driving the car, you were with him in it? A. Yes.

Q. Then you came back there and waited for the Missouri Pacific to come in? A. Yes.

Q. Whose guns were these that you got at your house? A. Why, one of them was mine and another fellow owned the other.

Q. What other fellow? A. I do not remember his name.

Q. Cannot remember his name. How long had you owned yours? A. Oh, I must have owned mine a couple of weeks.

Q. Bought it from this man on the witness stand, did you? A. I do not know; whether he was on the witness stand or not.

Q. Have you been sitting right before this jury all the time? A. Yes, I was writing for quite a while.

Q. You paid so little attention to the trial you do not know who the witnesses were on the witness stand where the charge is murder and you may go to the penitentiary for life.

Mr. Thompson: I object to the question as argumentative and improper, and immaterial.

A. It may be exactly like the revolver I had but it looks like one McCarthy had.

Q. We may get to that next. We just get to one at a time. At any rate you do not know whether the man on the witness stand got a gun from you? A. I was not listening to him. I did not hear him say I bought a gun.

Q. You do not know a man was on the witness stand and swore you bought a gun of him? A. I am not sure.

Q. You are not sure about that. Where did you buy that gun? A. Kansas and Packard.

Q. What kind of a gun did you buy? A. Bought a 44 Smith and Wesson.

Q. Did you buy any ammunition at that time? A. Yes, I bought a box of shells.

Q. A box of cartridges. Now, when you got up here and waited for the train to come in, you say in a little while McCarthy took out a bottle with some white stuff in it? A. He took out some cocaine is what he said it was.

Q. In a bottle? A. A little bottle.

Q. A little bottle? A. A little round bottle.

Q. You did not know what that was? Did you? A. That is what he said.

Q. I know you personally do you know what cocaine is? A. I did not take any of it.

Q. I said you, did you personally know what cocaine was? A. I personally know if I saw it?

Q. You saw it? A. I seen what it was; I seen it was white powder; I did not take any. You cannot tell cocaine unless you taste it.

Q. Do you know what it tastes like? A. I have seen it.

Q. Have you tasted it? A. I have.

Q. Then you know what it tastes like.

Mr. Thompson: Now that is settled.

Mr. Bond: Yes, for once.

The Witness: Ask him, he knows.

Q. That is all right, we will get at him after while. You did not take any of this cocaine? A. I did not.

Q. If this man did then commence to get gay he got a taste; he told you as I understand "I am

a railroad detective?" A. No, he said, "I am a railroad bull."

Q. "I am a railroad bull." What does bull mean? A. Well—

Q. In your parlance, does it—what does bull mean; does it mean an officer? A. Means a policeman.

Q. Policeman, "And just to show you I am a railroad bull, I will take you over here and introduce you to show you?" A. Why, sure.

Q. You wanted to meet them? A. No, I wanted to see whether he was or not.

Q. The only way to decide if he was or not was to have you go over and introduce you? A. No, not introduce me, I was going to stand outside and see what he was going to do.

Q. You were going to stand outside and see what he was going to do, so you reached in the pocket there and took out the 45 gun, and he reached in the bottom of the car and took out the crowbar to go over to see whether he knew the bull, is that it? A. No, I did not.

Q. Who was it took it? A. Your friend McCarthy did.

Q. Then you went over to meet the bull? A. We didn't go over to meet—I went over—

Q. You went to meet the bull. Where was the 45—strapped on the crowbar? A. No, I did not see the 45.

Q. The 44. He reached in the car and took out the iron crowbar? A. He did.

Q. You thought he was going over to show you he knew the railroad officers? A. He was cocky enough to go over to see most anything.

Q. You say you wanted to go over to see. When you were told in the car you had no idea he was going to rob a box car? A. I did not.

Q. Sure not. When you saw this iron bar you thought he was going to pick his teeth with it? A. Could have tried to pick some of the rest of the bulls' teeth.

Q. You had no idea you were going to rob a freight car? A. No, I was not going to rob nothing.

Q. You did not anyway, when you got over there. Now, you say Loar did not go with you? A. No, to my knowledge he did not. I was there.

Q. That he stayed in the car? A. Yes.

Q. And then when you got over here you met this railroad man and McCarthy shot him? A. Yes.

Q. You were not even there when he shot him? A. I was running.

Q. You were not there at the place where the man was shot at all; you were running up the train? A. No, I was running; that ray just come around from the other side.

Q. I thought you said you started running when you heard the shot being fired? A. I did.

Q. And is that the way you were going to find out whether McCarthy knew the railroad bulls or not by running as soon as you saw one? A. After I heard that I was not particular—

Q. After you heard what? A. Them two shots.

Q. Just wait a minute. The shots were not fired when you saw the man?

Mr. Thompson: He just told you he was standing off to one side; do you want him to go up and hug the bull.

Q. He just told me, did you not tell me he gets close to him—naturally you were going over to meet the railroad bull? A. No, I was not.

Q. You were going over to see McCarthy meet the railroad bull, and the minute the man flashed the light on you, you ran? A. Not the minute he flashed it on me.

Q. Didn't you just testify "the minute the man flashed his light on me, I ran, and while I was running I heard two shots fired." Didn't you swear that to the jury here? A. Just about the time I heard—I heard two shots fired.

Q. That is the way you went over to see whether he knew them or not? A. I was pretty well satisfied then.

Q. Were you satisfied before you ran? A. I say I was pretty well satisfied.

Q. Were you satisfied before you ran? A. I was pretty well satisfied.

Q. What satisfied you? A. That light satisfied me for one thing.

Q. Because the man threw his light on you. How was this man going to find out who you were? A. I did not want him to know who I was.

Q. And then when the shooting was over you ran up the hill; you did not shoot at anybody, did you? A. I did not.

Q. When you ran up the hill, you did not turn around and shoot at a man that had a flashlight in your face? A. No, I did not.

Q. You did not do it? A. No.

Q. But you ran up the hill; did you have a flashlight at all? A. I did not.

Q. Did he have one, McCarthy? A. He had one in the bottom of the car; I think he picked it up.

Q. He picked it up. When did you find out that the coat was in your way, cumbersome? A Up here in Leavenworth somewheres.

Q. The thing did not obstruct your running until you got up from the railroad track? A. I was pretty well mixed up in the shooting down there, and I did not stop to take it off.

Q. Weren't you mixed up in the overcoat and McCarthy had this on? A. I did not say I had an overcoat on.

Q. You say you had this on? A. I do.

Q. How far did you throw the coat away from the train you were stealing from? A. I did not say I was stealing.

Q. McCarthy trying to steal? A. Well, I do not know just how far it was.

Q. About how far? How many blocks had you ran? A. When I got up on top I did not run at all.

Q. How many blocks had you walked? A. I do not remember, maybe a couple of blocks.

Q. Maybe a couple of blocks. Don't you know it was not a block from where you threw it away to where this man's car was you got into? A. I do not know; I did not get in no car.

Q. You did not have anything to do with it? A. I said I did not try to steal it.

Q. Didn't you say you got on it? A. No, sir, I did not say I got on it.

Q. Did not touch it? A. No, I did not touch it.

Q. You stood to one side and let this man try to get the car? A. He got in it.

Q. What did you do? A. I stood out there and watched him.

Q. You just stood there and watched him manipulate it? A. I stepped up.

Q. You stepped up when it rolled. Who rolled it down hill? A. He must have rolled it, I did not.

Q. Did you get in while the car was— A. No, I stood on the side of the car.

Q. You stood on the side of the car? A. After it was rolling.

Q. You let it roll then you stepped on the runningboard of the car, is that it? A. Along the runningboard; I do not know much about a car.

Q. You know the runningboard from the engine? A. I expect I do.

Q. Do you know the runningboard from the engine? A. I could not tell you very well.

Q. You do not know? A. (No response.)

Q. When he could not get the car to go did he try to get another automobile right close there? A. No, not right close there.

Q. Well, within a short distance from where this car stopped? A. He did not try to get it; he just seen whether it was locked or not.

Q. Then, did you come on down Fourth Street, that is the street with the street car tracks? A. I am not acquainted wih Leavenworh. That is the first time I was here.

Q. At any rate where did you find the automobile? A. What automobile?

Q. The automobile you came back to Kansas City in? A. Some street down here.

Q. How did you happen to run across them? A. How did we come?

Q. How did you happen to come to where you got up with them? A. Why I was so mixed up, McCarthy says, "Here Hays is" and they drove down here. He says "Let's turn around, we are going the wrong way," so we started in that direction. We got so far down there and met him.

Q. You just started up Fourth Street and happened to meet him? A. It must have been around—I do not know where we met him.

Q. You have no idea where you were when you met him? A. No, I have no idea.

Q. Then you went on down to Kansas City? A. Yes.

Q. As soon as you found out you were wanted you went to Mr. Thompson's office and gave yourself up on the bond which you are out on on account of a conviction down at Paola? A. Yes, I did that.

Q. Then they arrested you in Mr. Thompson's office, did they not and brought you up here? A. I was turned over on the bond in Mr. Thompson's office.

Q. What? A. I was turned over on the bond in Mr. Thompson's office.

Q. And the authorities of Leavenworth got you and brought you here? A. I was in jail when they got me.

Q. You were taken then to jail and they went down and got you and brought you up here? A.

When they turn you over on a bond you go back to jail. I was in jail when they brought me up here.

Q. You went to Thompson's office and gave yourself up on a bond, then you were taken to jail by the officers to whom you gave yourself up in Mr. Thompson's office? A. By Mr. Thompson and the officers.

Q. What? A. By Mr. Thompson and the officers. We all went down together and got in jail and then I come up here.

Mr. Thompson: I didn't.

Mr. Bond: Well, you missed it this time.

Q. And when you were arrested then McCarthy told you that he had killed McDonald, did he? After McCarthy testified down here at the preliminary hearing and after you were held for murder in the first degree then you told Mr. Thompson that McCarthy had told you that he had murdered a policeman, is that right? A. He mentioned it.

Q. He mentioned it? A. He was in the car and he said he killed three men, "If he killed this one, that makes three on his list."

Q. Do you remember of throwing this coat away, where you threw it away, whether you threw it out in the street, along the sidewalk or where? A. I threw it in kind of a back yard.

Q. Towards the alley? A. I do not know whether there was an alley there or not; it was at the back end of a house.

Q. You did not see McCarthy throw away a searchlight? A. No, I didn't see him.

Q. As I understand you, he had it? A. I seen him pick it up in the bottom of the car.

Q. Did he take one of those revolvers; you say you took the 44 Smith and Wesson? A. He did.

Q. And he took the crowbar? A. Yes.

Q. Had all three of them in his hands? A. No, sir.

Q. What did he do with them? A. Put the crowbar on his arm; put the revolver in his belt.

Q. Carried this light in his hand, or do you remember? A. I do not know how he carried the light; I did not notice the light going over.

Q. I think that is all.

Mr. Thompson: I believe that is all.

Mr. Bond (continuing): You said that other gun belonged to somebody else; was it Loar's gun?

A. No, it was a Mexican's over on the boulevard.

Q. What is his name? A. I do not know his name.

Q. You do not remember his name? A. The Mexicans have funny names.

Q. What number on the boulevard? A. I do not know; Southwest Boulevard there somewhere.

Q. How many miles long is the boulevard? A. I do not know.

Q. He is somewhere there; that is the man owns that gun? A. This Mexican.

Q. That is all.

(Witness excused.)

Plaintiff offers in evidence the deposition of Lawrence Hayes, taken in the State Penitentiary at Lansing, Kansas, March 24th, 1928, and the defendant offers in evidence the exhibits attached thereto as follows:

Said depositions and exhibits are in the words and figures as follows, to-wit:

LAWRENCE F. HAYES, of lawful age, being by me first duly cautioned and solemnly sworn to tell the truth, the whole truth and nothing but the truth, deposed and said as follows:

Direct Examination by Mr. Seacat.

Q. You may state your name? A. Lawrence F. Hayes.

Q. You are now a prisoner in the State Penitentiary at Lansing, Kansas? A. Yes, sir.

Q. Where was your home, Mr. Hayes, before you came to the penitentiary at Lansing? A. Kansas City, Kansas.

Q. And what business were you engaged in in Kansas City, Kansas? A. None in particular.

Q. Where did you live in Kansas City, Kansas at that time? A. 725 South Boeke Street, Kansas City, Kansas.

Q. Were you acquainted at one time with Harry or Pat McCarthy? A. Yes, sir.

Q. Were you acquainted with Bert Gladsen? A. Yes, sir.

Q. And with Nathan, otherwise known as "Red" Loar? A. Yes, sir.

Q. And to fix the time, do you remember, an occasion, when a man named James Lee David was killed at Leavenworth, Kansas? A. Yes, sir.

Q. That occurred on the 17th day of May, 1923, didn't it, Hayes? A. Yes, sir.

Q. Do you recall where you were during the day prior to the night on which David was killed? A. Yes, sir.

Q. Where were you? A. In the court room of Judge McCamish—no, Judge Hutchings, in Kansas City, Kansas.

Q. What was the occasion of your being there? A. We were attending the trial of Hogie Ward.

Q. In Judge Hutchings' court? A. Yes.

Q. Well, you say, "We were attending the trial," who all do you mean? A. Well, there was Riley, George Riley, and myself; Masterson; Gladsen, and I believe Ray Brayner, and oh, there was a bunch there. I do not remember them all. I cannot recall.

Q. Do you remember whether Harry or Pat McCarthy was in attendance at Hogie Ward's trial at that time? A. Yes, sir, he was.

Q. Were you subpoenaed as a witness? A. No, sir.

Q. Just spectators? A. Yes, sir.

Q. During that day, that is the day prior to the night on which David was killed, did you have any conversation with Mr. McCarthy? A. Oh, several conversations. We talked practically all afternoon.

Q. And how early in the day did you first come in contact with McCarthy that day? A. Somewhere around eleven o'clock in the morning.

Q. You met him at the trial, did you? A. No, we met down at Riley's place.

Q. You met McCarthy at Riley's place? A. Yes.

Q. Then you went to the trial? A. We went to the restaurant first, I believe.

Q. During that time state whether or not, Hayes, you were present at a conversation, or had any conversation with McCarthy about the robbing—about committing a robbery during the coming night? A. Oh, yes, we discussed it.

Q. Will you state at this time what the substance of the conversation was? A. Well, he brought the subject up himself about stealing something, and I asked him where he thought he wanted to go. He said, "Well, anywhere." He said, "Leavenworth is close."

Q. What time of the day, or about what time as you recall any conversation, was it that you first discussed the subject of going out that night? A. Well, we discussed it practically at different times all afternoon.

Q. About when was it you first talked it? A. Oh, I guess two thirty, or two o'clock, somewhere along there.

Q. Somewhere along in the afternoon. Did you have at that time in this conversation with McCarthy any understanding as to what the nature of this robbery would be? A. Well, not exactly. It was generally understood we were robbing boxcars.

Q. Had you been doing that? A. Yes, we had been doing that a long time.

Q. This outfit, Gladsen, Riley, McCarthy, and Masterson had been associated together for some time; was that true? State whether it is a fact that you had on prior occasions shortly before this been robbing boxcars? A. Yes, we had been robbing boxcars quite regular.

Q. Did you have any conversation there at that time with McCarthy or during that day about any particular train you were to rob? A. Well, not exactly. It was a fact, well pretty near a fact, that at any time we went out we were robbing Missouri Pacific box cars.

Q. Why was that? A. Well, I do not know just exactly why, but I guess it was because they carried the most valuable stuff.

Q. What was the character of stuff you were trying to reach at that time? A. Why cigarettes, Camel cigarettes.

Q. Did McCarthy say anything to you directly about robbing the Missouri Pacific at Leavenworth that night? A. He mentioned going to Leavenworth; it was understood we were to rob the Missouri Pacific.

Q. Let me state it this way: What if any arrangements were made during the afternoon looking toward the fulfillment of this intention and plan to go to rob that night? A. There was no plan or anything made, just, we didn't have no set plans to rob cars that we figured on ahead just what we would do. We didn't use the same plan every time.

Q. You didn't use the same plan every time? A. We—

Mr. Hackney: Let him tell his story.

A. We used the same plan nearly every time, but we didn't plan it ahead. We just selected where we would carry it out, and would drive and carry it out there.

Q. After the trial adjourned in Judge Hutchings' court where did you go? A. Went to George Riley's place.

Q. What time did you leave the courthouse? A. Somewhere around five thirty or six o'clock.

Q. Did you go directly to Riley's house? A. Yes.

Q. And who went to Riley's house at that time? A. Well, McCarthy, myself, Bert Gladsen, Ray Brayner and Masterson.

Q. And that was about five thirty or six o'clock in the evening? A. Yes, sir.

Q. While you were at Riley's house, state whether or not you had any conversation concerning the purposes and activities of the night? A. Yes, McCarthy asked Riley to borrow a gun, but Riley would not let him have it.

Q. He asked Riley to borrow Riley's gun, is that the way you understood it? A. Yes, sir.

Q. You do not remember the conversation there at Riley's house? A. Not exactly, it has been so long ago.

Q. When did you leave Riley's house? A. About six thirty, or a quarter to seven.

Q. Where did you go from there? A. Went down to the restaurant to eat.

Q. Where? A. Sixth and Kansas Avenue.

Q. Over in Armourdale? A. Yes, sir.

Q. And who was along at the restaurant? A. Well, the same bunch with the exception of Ray Brayner.

Q. That McCarthy and Gladsen? A. McCarthy, Gladsen, myself and Masterson.

Q. Then where did you go when you left the restaurant? A. Why, Masterson wanted to go to the doctor's office.

Q. Where was the doctor's office? A. The doctor's office was at 7th and Armstrong.

Q. How were you traveling? A. Traveling in my car.

Q. You were driving? A. Yes.

Q. The doctor's office was about where the Elk's Building is located, is it? A. No, it is about a block north of the Masonic Temple.

Q. About a block south of Minnesota Avenue? A. Just a block.

Q. Just a block south of Minnesota Avenue? A. At the Federal Building.

Q. The Federal Reserve Insurance Building? A. Federal Insurance Building.

Q. And who was in the car when you went to the doctor's office? A. McCarthy, Masterson and myself.

Q. About what time was that? A. That was eight o'clock.

Q. About eight o'clock in the evening? A. Eight o'clock, or somewhere near.

Q. And where did you stop your car at the doctor's office? A. Stopped it right in front of the doctor's office, heading south.

Q. Heading south in front of the Federal Reserve Life Insurance Building? A. Yes, sir.

Q. Masterson got out of the car? A. And McCarthy too.

Q. Both Masterson and McCarthy? A. Yes.

Q. And do you know where McCarthy went when he got out of the car? A. He said he was going to the drugstore.

Q. He said to you he was going to the drugstore? A. Yes.

Q. Masterson went to the doctor's office? A. He went upstairs to the doctor's office in the Federal Reserve Building.

Q. You stayed in the car? A. Yes, sir.

Q. What happened next? A. Well, nothing happened until about five or six minutes. The way I figured what floor the doctor's office was on, on the third or fourth floor. I thought he went up the steps, and when Masterson came back down and got in the car he sit there and he lit a cigarette and said, "The doctor ain't there." I asked him what he was going to do, wait or stay there? He says, "Yes." So I says, "Let's go to the drugstore and get a drink," so we turned around and went to the drugstore on 7th and Minnesota, northeast corner of 7th and Minnesota. I stopped the car in front of the Bank, People's, is it?

Q. Directly across from the post-office? A. No, directly across from the drugstore, postoffice too.

Q. Southeast corner of the intersection? A. Yes, sir, People's National Bank. Stopped the car, locked it and went over in the drugstore and joined McCarthy there. We all had a drink.

Q. Was McCarthy in the drugstore when you got in there? A. Yes, sir.

Q. And so far as you know McCarthy hadn't gone up into the doctor's office with Masterson? A. No, I know that. I seen him go there.

Q. You saw him go in the door at the drugstore? A. I stopped in front of the door.

Q. How long in your judgment, Hayes, was it from the time that McCarthy left Masterson at the

door of the Federal Reserve Life Insurance Building until you saw him again at the drugstore? A. Well, I guess somewhere between six and seven minutes.

Q. Somewhere between five and ten minutes? A. Seven or eight, somewhere along there, seven or eight minutes.

Q. A substantial length of time? A. Substantial?

Q. Yes. A. Well—

Q. What was McCarthy doing when you got to the drugstore, or when you got into the drugstore? A. Why, I do not know. I guess he was looking around. Just,—I don't even know what he went there for. I guess he wanted a drink or something, but he was not drinking when he got there.

Q. Did he join you in your drink you had? A. Yes.

Q. That was, you say, about eight o'clock in the evening? A. Oh, that was a little later; that was about between eight and nine sometime.

Q. What had become of Bert Gladsen in the meantime? A. Oh, we left him off on the way up. He had a date that evening. We left him off at 10th and Minnesota—10th and Central.

Q. Tenth and Central? So he was not with you at that time? A. No, sir.

Q. Then, where did you go from the drugstore? A. We went down to the foot of Minnesota Avenue.

Q. About what street corner would you say that was? A. Foot of Minnesota Avenue? Then Masterson—

Q. Yes? A. That was about Second and Minnesota.

Q. Second and Minnesota? What were you going to say about Masterson? A. Well, Masterson went back to the doctor's office after we had a drink.

Q. He didn't go with you? A. No, sir.

Q. To the foot of Minnesota Avenue? A. I do not think so.

Q. What did you do at the foot of Minnesota Avenue? A. Well, there was a train pulling by there, you know, a loaded freight train.

Q. Yes. A. We pulled down, both got out of the car and walked down, and watched it go by.

Q. You were watching the train go by? A. Yes.

Q. Do you know what road that train was on? A. Yes.

Q. What road was it on? A. Missouri Pacific.

Q. Do you know whether or not it was a Missouri Pacific train? A. Yes, I know positively it was a Missouri Pacific.

Q. What was your purpose, Hayes, in going down to watch the train as you did? A. Well, we had some information about some boxcars, and I went down to see if there was a couple on that train.

Q. You were looking for particular box cars? A. Yes, sir.

Q. And did you observe them on that train? A. Yes.

Q. Then where did you go? A. Then we went back on Minnesota Avenue to 10th Street, south

on 10th to Central, and went across Central Avenue when I heard a voice, and I turned around and recognized Gladsen, and I stopped the car, and he got in; and we went on down to Red Loar's house and we got Red.

Q. You got Red at that time? A. Yes.

Q. What shape did you find Red in when you got to his house? A. Well, we didn't find Red. Gladsen and I stayed in the car and McCarthy went to the house.

Q. To Red's house? A. To Red's front door and knocked. It was ten or fifteen minutes before Red was ready. He said he was in bed when he come back to the car.

Q. Had you got any guns by that time? A. No, sir.

Q. Had no guns at that time; none of you? A. No, sir.

Q. Did you procure any guns that night? A. Later on, yes.

Q. Was that after Red joined you? A. Yes, sir.

Q. Where did you get those guns? A. Got them at Gladsen's house.

Q. Got them at Gladsen's house? A. Yes, sir, on South 13th Street; about 833 South 13th Street; somewhere along in there.

Q. That is after you picked up Loar? A. After we picked up Loar on the way up. On the way out to Gladsen's house we stopped at Ferry and Osage at McCarthy's sister's place. He went on the front porch and got a pair of overalls and jumper he had there. We went on to Gladsen's house.

Q. That was Ferry and Osage? A. Ferry and Osage.

Q. Where did you stop at that time with reference to the house? A. Well, the house sat on the corner of the alley; we stopped on the street. We could see him all the time.

Q. Was he in the house at that time? A. No, he was on the front porch.

Q. How far away from the car did he go? A. Quite aways I judge, 60 yards I judge.

Q. About 60 yards away from the car. How long was he away from the car at that time? A. About as long as it took him to walk that far.

Q. Were you familiar with those streets out there? A. Yes, pretty familiar.

Q. Do you know whether or not his sister had a telephone? A. I do not know that.

Q. You do not know that? A. No.

Q. What was her name? A. Why, her name was, I do not remember what her name was now.

Q. Then where did you go, Hayes? A. Then, we went to Gladsen's house.

Q. That is after you left the sister's house you went to Gladsen's and got the guns? A. Yes.

Q. How many guns did you get there? A. Got two pistols.

Q. Who carried them? A. McCarthy carried one; Gladsen the other.

Q. Get anything else there? A. Oh, yes, we got an iron bar.

Q. What did you intend to use the bar for? A. We used it to open boxcar doors with.

Q. Then, where did you go? A. Then we drove to Leavenworth.

Q. What time did you get to Leavenworth? A. About,—somewhere around eleven o'clock.

Q. Where did you drive to in Leavenworth? A. Why, I drove to the eastern part of town and southeastern part of town and stopped at an old sugar refinery, there on a little creek bridge.

Q. Was that near the Missouri Pacific tracks? A. Oh, it was about half a block, I guess.

Q. Do you know whether or not this train had come up at that time? A. No. We knew the schedule pretty well; we knew it hadn't.

Q. Had you committed any robberies at that place before? A. Yes, several.

Q. Had you ever committed a robbery on this particular train? A. Yes, several times. They call it the same train; it makes the same time; they call it the same train.

Q. Do you know where the train makes up to start? A. Yes, sir.

Q. Where? A. East Bottom.

Q. Over in Kansas City, Missouri? A. Yes, sir.

Q. I do not know what you answered as to whether the train had come in at that time? A. No, it hadn't come in.

Q. Do you know about what time you left Kansas City, Kansas? A. Well, somewhere around ten o'clock.

Q. What time did you get to Leavenworth? A. Eleven fifteen or eleven twenty.

Q. Just go ahead now, Hayes, in your own way and tell what you know about what took place at Leavenworth? A. Well, the train whistled about twelve o'clock or somewhere along there.

Q. Yes. A. McCarthy and Gladsen got out of the car. We left, Red Loar and I and that is all I know about it.

Q. McCarthy and Gladsen got out of the car? A. Yes.

Q. Well? A. Loar and I drove to Leavenworth, drove to a restaurant. I forget the name of the restaurant. We were to meet there in the town but we drove to the other end of town, and I was to wait for them up there.

Q. What was the plan? How did it happen, Hayes, you were to meet them at the other end of town? A. Well, we got—we planned to rob the box cars on this south end of town, and get the stuff ready, then throw it out in the north end of town; and that we could meet there and take—and take them on back to Kansas City.

Q. At a particular crossing? A. Yes, sir.

Q. In the north end of town. Did you drive to that crossing? A. Not at first no. We drove to a restaurant first, because we knew there would be a delay in the yards of about fifteen or twenty minutes.

Q. Did you finally reach the crossing? A. Yes, sir, we finally reached the crossing and waited until the train went thru. Nobody showed up, so we drove back, Loar and I drove back down to this mill again. Nobody showed up there. Then we circled around for half an hour just going every place. Nobody showed up, so we started to Kansas City, and then on the Kansas City Victory Highway we picked—they hollered along side of the road; they seen us coming. We stopped and took

them to Kansas City. That is all I knew about it. That is all there was to it.

Q. Then, when were you arrested after that? A. I was arrested next day at ten o'clock; I mean two o'clock.

Q. Hayes, during the afternoon or evening of this day prior to the killing of David on this trip you have told us about were you, or any of your gang you know anything about, watching McCarthy? A. No, sir.

Cross Examination by Mr. Hackney.

Q. How many times have you testified as to the facts pertaining to this killing of David and your previous arrangements and conduct? A. Three times, I think.

Q. When and where have you testified previously? A. Oh, testified first at Gladsen's trial, Leavenworth.

Q. Yes? A. Second at my own, and now here.

Q. This is three times? A. Three times.

Q. How many times have you been interrogated where you agreed to give a full statement of the facts, not as a witness, but called in examination? A. How many times?

Q. Yes. A. Oh, several times.

Q. When you testified in your own case when you were convicted, did you testify the truth, or tell anything but the truth? A. Well, I guess so.

Q. Was your recollection better then than it is now? A. Yes, sir, I would imagine.

Q. Now, calling your attention to your testimony as reported by Mr. Tharp, who is now taking this deposition; and by the way, your father was present at your trial, was he not? A. Yes.

Q. And when you testified? A. Yes, sir.

Q. And calling your attention to the statement, page 3: "You went home to supper, did you? Yes. Where do you live? 725 South Key street. You lived there with whom? My father."

Q. You testified to that? A. Well, I went somewhere for supper.

Q. Then: "You saw Harry McCarthy after supper? Yes."

Q. You answered that? A. Yes.

Q. Then you testified to having seen him at Riley's place. A. Yes, sir.

Q. Now then, do you remember testifying in your trial that after taking Masterson up to the doctor that he didn't find the doctor as you have said here and that he wanted to go back again. That is correct? A. Yes, sir.

Q. Now after that do you remember testifying that you left Masterson and McCarthy both down town and you went to your mother-in-laws? Here is the question: "Did you leave Masterson there and go someplace else? I left Masterson and McCarthy both there. And where did you go? I went out to my mother-in-laws. Where does your mother-in-law live? I do not know what the name of the street is."

Q. Do you remember that you testified to that? A. No, sir.

Q. You do not remember that?

Mr. Seacat: Let me put in the record, plaintiff objects to this manner of cross examination. May the record show we object to that method of cross examination, using a document or record.

Mr. Hackney: Yes, you can make that objection at any time.

Q. I will call your attention to the other testimony right following the last answer you gave about going to your mother-in-laws. "What happened? Went to Minnesota Avenue; to 10th and Central; to the railroad tracks and to the Union Pacific."

Q. Did you testify to that? A. No, I didn't.

Q. Then again: "When did you next see McCarthy? Why, after I took my wife and her sister out to my wife's sister's place, and took my wife home and went back and picked up Masterson and brought him along."

Q. Do you remember making that statement? A. No, may have done it.

Q. The next question, do you remember this: "Where did you meet McCarthy? He was in front of the doctor's office."

Q. Did you testify to that? A. I do not believe so.

Q. You do not recollect that? "Did you pick him up there then. Yes, I picked him up then."

Q. Do you remember that? A. No, I do not.

Q. Now, did you testify that McCarthy went down to Third and Minnesota? A. Yes, sir.

Q. At what time of day did you testify he went down there? A. Well, that was about somewhere in the evening, I guess about 8:30, or somewheres—

Q. Then, do you remember that you were asked this question: "Did the train pass there? There were some box cars moving; I presume it was a train."

Q. Do you remember making that answer? A. Yes, sir.

Q. Next question: "Was there anything said, any plan about robbing a train that night by you and Harry McCarthy? No, sir, not me."

Q. Do you remember testifying to that? A. No, sir, it had been planned.

Q. Did you make that answer that is recorded there? A. I do not remember it.

Q. You do not remember it? A. No, sir.

"What was said about the train? There was nothing said about robbing the train. He says, 'You might ride me around awhile tonight.'"

Q. Do you remember that question and that answer? A. No, I don't.

Q. You do not remember that? A. No, sir.

Q. Is that what he said to you that "You might ride me around awhile tonight?" A. Well, that would be—

Q. Didn't he say that there? A. I do not remember.

Q. Now then, didn't you go on and testify; you were asked if you run a regular express business, and you said "Yes." Do you remember that answer? A. Yes.

"You had been hiring your car out? Certain occasions, yes, sir."

Q. Do you remember that answer? A. Yes.

"What happened there then; what else did he say about your car? He wanted to know if he

could have the use for this evening, and I said, 'Yes.'"

Q. Is that correct? A. Yes, sir.

Q. Do you remember the next: "Then what happened next? Then he says, 'Let's go back up and see if Charley has got out of the doctor's office yet.'"

Q. Do you remember making that answer to that question? A. No, I don't.

Q. Now, I will ask you if you didn't then testify after stating who Charley was, Charley Masterson: "Just go ahead Lawrence, in detail and tell as well as you remember what happened from this until the time your car came up to Leavenworth?"

And your answer: "Well, I stopped at the drugstore. I stopped to get Masterson. The doctor had not come. The doctor was an operating physician at Bethany Hospital and he left word with the druggist he might be back at his office within an hour, so Masterson says, 'I am going to wait,' so I presume he waited, so McCarthy says, 'Let's go to Armourdale.' It was right on the way home so I did not know what else to do, so we went down thru Armourdale on 10th Street. It is a good street. More traffic takes that than any other street. For that reason I always go down 10th. I went down 10th Street. As I was approaching the intersection of 10th and Central I heard McCarthy holler, he says, 'There is Bert back there.' So I reached and got the emergency brake and brought it to a stop in the middle of the car tracks on Central Avenue. So Bert came and got into the car and we went to Armourdale. So

McCarthy and Bert were talking about something I could not quite catch. They did not seem to be talking in an undertone, nothing like that. McCarthy said, 'Let's go down and pick up Red.' So I drove towards Red's house. McCarthy got out and went up to his front porch, and I heard a lady's voice. I do not know who it was, whether it was his wife's or his sister, or who it was. I heard the lady say he would be there in a minute, so when he come back McCarthy said, 'Drive to Bert's house' and I drove to Bert's place. Bert went inside and came out carrying a Jacket out. That is all I seen him carry out. McCarthy said he would make it right with me if he made some money. We come out and he directed around thru these roads and pretty soon we stopped at a place. I do not know where we stopped."

Q. Now, do you remember making that answer? A. Yes, sir.

Q. That was true, was it not? A. Yes.

Q. Just the answer, all of the answer I have read? A. Yes, sir.

Q. You were asked to identify a gun and you said you didn't have any gun. Didn't you then testify on examination like this: "You do not know the streets here in Leavenworth. No, sir. You do not know where you stopped at? A. No."

Q. 'Did you make that answer? A. Yes, sir.

Q. This question: A. I later found out where they were at.

Q. Now, then this question: "What happened when you did stop? Why we stopped there possibly five minutes and somebody said something about a car coming so Harry says, 'Let's

go that way.' So we went that way, that is the way he pointed. We went down that way possibly two miles. He says, 'Turn around, let's go back.' and we went back. We stopped there. So waited there for I guess 35 or 40 minutes. Then I began to notice something queer, something odd. I did not think when we started that we were going to come up here to steal. When they heard this train whistle Harry and Bert got out of car. Red Loar and I stayed in there. Presently Bert came back and whispered something in Red's ear. I did not know at the time what he whispered, but Red said they were coming up, that he was a detective. That is what Bert told him; that he was going down here to pilfer this train or whatever it was. And so when they left there I got sore at them. I said, 'If you are coming up here to steal I am going home.' Red and I stood there debating for awhile. Pretty soon I pulled out.''

Q. You made that answer to that question? A. Yes.

Q. It was true? A. Yes, sir.

Q. Then you didn't go up there with the idea of stealing anything? A. Well, yes, we knew we were going up there to steal.

Q. Why did you testify you were angry when you heard they were coming up here to steal? A. Well, we had to beat the case you know. We figured we had to beat the case.

Q. You figured you had to beat the case. You just told that to beat the case, is that it? A. Yes, we wanted to make it look good our way.

Q. Is that your reason for making that answer? A. Yes.

Mr. Seacat: Let me ask please, from what you are reading.

Mr. Hackney: I am reading from the official transcript of the stenographer who took the testimony, and is taking the testimony here now.

Mr. Seacat: On what trial?

Mr. Hackney: The trial of his own case.

Q. Do you remember—it is the direct examination by Mr. Kelsey, his lawyer. Do you remember that? A. I do not remember just word for word.

Q. That is the substance. That is correct, all I have read here, is it? A. I do not know. I do not remember now.

Q. Now, did you hear any shooting up there? A. No, sir.

Q. Didn't hear any shooting? A. No, sir.

Q. Didn't you know David was killed? A. No, sir.

Q. You remember when you were tried up here at Leavenworth? A. Yes, sir.

Q. Now, do you remember who it was that cross-examined you? What lawyer, the county attorney? A. I believe it was.

Q. Mr. Bond? A. I do not know. I believed it was Endres.

Q. Well, anyhow, you were asked a question about going down and looking at a train down there that night, presumably this train you have been talking about, and didn't the attorney on cross examination ask this question: "Was that what you were looking for, a string of box cars."

Q. And your answer: "He asked me to go with him. I had no idea what he was going to do"

(referring to McCarthy). A. I do remember that question.

Q. The next question: "Then you came back and got in your car? A. Yes."

Q. Question: "Then he asked you to hire your car? He said he would make it right with me if I would drive him around awhile."

Q. You testified to that in your trial? A. I do not remember.

Q. Now, you were asked also this question, that after Harry suggested you stop and get Masterson: "Then what did Masterson say? They went into the drug store, I think."

Q. Do you remember testifying to that? A. No, sir, we all went into the drug store. "Masterson could not go because the doctor had not come, is that not true? I do not know."

Q. The next question: "Didn't you hear him say so? Harry was talking to him in front of the drug store. I was waiting across the street."

Q. Did you answer that? A. I do not believe so.

Q. Was that the fact? A. I do not remember the question even.

Q. You do not remember that question and that answer? A. No, sir.

Q. Now then, Hayes, you knew Bert Gladsen real well, didn't you? A. Yes, sir.

Q. You knew he was a bandit? A. Yes, sir.

Q. Highway-man? A. Yes.

Q. Bank robber? A. Yes.

Q. Payroll robber? A. Yes.

Q. And a train robber? A. Yes.

Q. How long had you known that? A. Well, I didn't know it very long. I knew it, I guess, six or eight months.

Q. Do you remember about two weeks before that night when David was killed in a train robbery at Walcott? A. Yes, sir.

Q. You were in that, weren't you? A. Yes.

Q. How many of these men were in it (reading)? "Bert Gladsen, Red Loar, George Riley, Hobart Ward, Freddie Thompson, Lawrence Hays, (yourself) John Rock, Sunny Davis, and George Oftener (spelling)." A. That is correct.

Q. You had how many automobiles? A. Two.

Q. How many cars did you rob? A. The whole train I guess.

Q. You stood the brakeman up against the telephone pole and one man held a six shooter or rifle on him while the other men were robbing the train? A. I do not know. I was driving the car. I was out in the road.

Q. You could see the boys who were doing that? A. Yes.

Q. They held up the brakeman and made him stand still at the road crossing? A. Yes.

Q. Loaded the stuff in the trucks and got away? A. Yes, sir.

Q. That was the night of May 2nd? A. Yes.

Q. Two weeks before you boys went up there and had this robbery at Leavenworth, or attempted robbery at Leavenworth? A. Yes, sir.

Q. Now, David was not on that train that night? A. I do not know.

Q. There were two train riders? A. Yes, sir, there were two train riders.

Q. The Missouri Pacific was having two train riders most of the time? A. Yes, sir.

Q. Don't you know one of the train riders had got left and there was only one on the train that night? A. No.

Q. And he was out in front watching— A. There was two train riders. Both train riders were in the rear.

Q. They were both in the rear? A. Yes.

Q. McCarthy was not in that bunch? A. I think he was.

Q. Don't you know he was not there? A. No, I don't believe he was either.

Q. Bert Gladsen was tried and given a life sentence? A. Yes.

Q. For the murder of David? A. Yes.

Q. And McCarthy testified on his trial? A. Yes.

Q. That Gladsen was the man shot David? A. Yes, sir.

Q. And McCarthy also testified in the trial against you, didn't he? A. Yes, sir.

Q. Don't you know the question was asked McCarthy why he didn't report the intended robbery of this train in one of those trials? A. Yes.

Q. He testified to that. Red Loar was given a sentence for how many years? A. Thirty-five years.

Q. Thirty-five years. You were given a sentence of how many years? A. Thirty.

Q. How many? A. Thirty years.

Q. Now then, did you ask Mrs. David recently to assist you in getting your sentence cut down, you, Gladsen and others? A. Not me, no, sir.

Q. Did you know if it was being done in your behalf? A. No, sir.

Q. And that she had consented to do it? A. No.

Q. When was it taken up with you about testifying here? A. Six or eight months ago.

Q. Who talked to you about it? A. Two or three years ago.

Q. Two or three years ago? A. Two or three years ago Tolbert talked to me.

Q. Coming back to that, do you remember on Sunday, January 20, 1924, that you were in the office of G. M. Stringfellow, Sheriff of Leavenworth County, at Leavenworth, when you were questioned by some gentlemen? A. Yes, sir.

Q. Now I will ask you if these men were not present: "Honorable Charles G. Griffith, Attorney General; Mr. Roy R. Hubbard; Mr. L. S. Harvey, Mr. Hayes, your father; Mr. J. N. Baird, County Attorney?" A. Yes, sir.

Q. And you made a statement? A. Yes, sir.

Q. And your statement was taken down by E. S. Massey, shorthand reporter? A. Yes, sir.

Q. Do you remember what was said before they asked you to make a statement? A. No, I don't.

Q. That was after your case had been disposed of in the Supreme Court, and you were there to be dressed into the penitentiary, weren't you? A. Yes, sir.

Q. And didn't you undertake to tell the truth on that occasion? A. Why, I told the truth, I think, as close as I could.

Q. As close as you could from your best recollection? A. Yes.

Q. Now, I am going to ask you to look at this document I have, and read that commencing at the first; read the first page. A. (Examining.)

Q. You have looked over a part of that? A. Yes.

Q. You recognize that as being a report of your statement? A. Yes, sir.

Q. Now, I will ask you if you remember on that occasion that you undertook to tell the Attorney General, who was examining you, what different robberies you had been in, and you told him of several? A. Yes, sir.

Q. And first you told him about robbing the Central Avenue Bank across from Armours? A. Yes.

Q. And that you and Hobart Ward and George Riley were on that robbery? A. Yes, sir.

Q. And that you testified you and Riley stole a car from Miss Mary Kline to do the robbery? A. A Nash car.

Q. And do you recollect you told how much money you had gotten in that robbery; how much was divided; do you remember that? A. Yes.

Q. Then you told him of the Wilson payroll robbery, which was pulled off by you and Riley and Hobart Ward? A. Yes, sir.

Q. And in that payroll robbery you took how much money, do you recollect? A. About $5500.

Q. $5400 and some odd dollars, was it not? A. Yes.

Q. Then you told him of some other robberies, and how the money was divided, and then he directed your attention to this attempted robbery of the Missouri Pacific train—before I get to that; you told him about the Turner bank robbery, also, did you not? A. Yes, sir.

Q. How much money did you take? A. $2250.

Q. Who was in that out there? A. Gladsen I believe.

Q. Gladsen? A. Masterson and myself.

Q. Gladsen, Masterson and yourself; and that you took the money to Riley's house on that occasion and divided the money. Now then, coming down to the attempted robbery of the Missouri Pacific in question, don't you remember the Attorney General Mr. Griffith asking this question: "Now, referring to the case on which you were convicted, who was with you on that case?"

Q. And you answered: "Harry McCarthy and Bert Gladsen and Nathan Loar."

Q. Do you remember making that statement at that time? A. Yes, sir.

Q. This referred to that attempted robbery at Leavenworth that night? A. Yes, sir.

Q. Now then, I will read you the next question by the attorney general: "Riley was not with you on that? A. No, sir."

Q. (reading again) "Who framed this affair?"

Q. And you answered? "Well nobody framed this affair. At Bert's request we started out so he could get some money; he didn't have none, that is, I took Red Loar out."

Q. Do you remember making that answer? A. No, it don't sound right.

Q. And you were asked: "At whose request? A. At Bert Gladsen's."

Q. Do you remember making that answer? A. No, sir.

"At Bert Gladsen's request you took Loar out. Where did you meet? A. Started to take him out."

Q. Did you make that answer? A. I do not remember.

Q. The next question: "Didn't you know where you were going before you went? Well, I didn't know the roads very well; I was only up here one time."

Q. Do you remember that answer? A. Yes, sir.

Q. "Here" referred to Leavenworth, did it? A. Yes, sir.

Q. (Reading) "Did you know what you were going after? No, sir; we didn't have anything in particular."

Q. You made that answer, didn't you? A. Oh, well, I do not remember whether I did or not, but we never had anything in particular.

Q. Didn't General Griffith say: "Sir? There was nothing in particular, just wanted to rob some box cars."

Q. Is that the answer you made? A. Yes.

Q. (reading) "Where did you start from to this place where this man was killed? Started from Riley's house."

Q. You answered that, didn't you? A. Yes, sir.

Q. "All right. How did you happen to be over at Riley's house? Oh, we all went down there and hang out down there."

Q. You answered that? A. Yes.

Q. Now, you were asked: "When you went down to Riley's house did you know that you were going out on this work?" A. Repeat the question.

(Question reread.) "Not until later on, until Bert told me that Red was broke and needed some money."

Q. Didn't you make that answer? A. I do not know. That might have been so.

Q. That is you may have made that answer. You do not say you didn't. If you answered it it was true, was it not? A. Yes.

Q. Do you remember answering this: "You went down to Riley's house the night before this man was killed here in this county? The same night."

Q. Do you remember that? A. Yes, sir.

Q. "The same night. And who was there at Riley's house? Harry McCarthy, Bert Gladsen and I drove up there, and Harry McCarthy and Riley and Ward and Thompson was all in there."

Q. Do you remember that? A. Yes, sir.

Q. (reading) "That is Fred Tnompson? Fred Thompson."

Q. Do you remember that? A. (No response.)

Q. (reading) "You have named all that were in the house? I think yes, that is all, besides his mother."

Q. Now then notice this, didn't he ask you this: "At the time you went over there you hadn't any idea about this particular deal? No, sir. I never had talked—"

Q. Do you remember saying that much? A. No.

Q. "I never had talked." A. No, I do not remember that.

Q. You do not remember making that? (reading) "Anyone come while you were there? I believe a fellow by the name of Phillips came while we were there."

Q. Do you remember making that answer? A. Yes.

Q. (reading) "What is Phillips' name? His name was, I don't know, he is a special agent for—Charles Phillips, special agent for the Santa Fe."

Q. You answered that? A. Yes, sir.

Q. Do you remember you went on to tell about some understanding with Phillips to keep off the Santa Fe? A. Yes, sir.

Q. He used to be a Missouri Pacific special agent? A. Yes, sir.

Q. Do you remember this question being asked you: "Now, the night you were at Riley's house what was the first thing said to you and by whom about this deal that you are now convicted of?"

Q. Listen to this: "A. Riley said there is Camels going out on the Mop tonight. I don't know where he got the information; I suppose he got it from Phillips."

Q. Do you remember that answer? A. Yes.

Q. (reading) "What do you mean by that? I don't know how he got the dope they would be any cigarettes going out that night. Riley got a tip that there was some cigarettes on this Missouri Pacific train but I don't know how he got the tip, whether he got it from Phillips, or who he got it from; I suppose he got it from Phillips."

Q. Do you remember that answer? A. Yes, sir.

Q. That was true, was it not? A. Yes, sir.

Q. Then the next question? "What was said about you going out?"

Q. And you answered: "Gladsen told me, 'Let's get Red Loar,' and Harry McCarthy was there, and he was crying; always crying to come up here; they wanted to go some place on the Missouri Pacific and I never had gone with them no place and Riley said it was all right, so he says, 'Take him along,' so he wanted to go—"

Q. You answered that? A. I do not remember.

Q. Is that a correct statement about the matter, that McCarthy wanted to come up, and you boys decided to go up, and Riley told you to go and take him along? A. No, it was not that way.

Q. That is not correct. (reading) "Was he a younger man or older man that you are? He is 30 years old or 28 or something like that. So,

he says, 'Take Harry and Red and Bert and go up and make that train.' ''

Q. And you answered General Griffith— A. I do not remember now.

Q. Well, is that not a fact? A. Well, I do not know.

Q. Your memory was better in 1924 than it is now? A. I imagine so.

Q. You were trying to tell the straight of it at that time, weren't you, Lawrence? A. Yes.

Q. Now then, didn't he ask you these questions: "Harry and Red and Bert, give me their other names? Harry McCarthy and Red Loar and Nathan Loar and Bert Gladsen and myself."

Q. That is correct? You remember making that? A. Yes, sir.

Q. Then: "Did he tell you car to take? No, I took my own car."

Q. That is correct, is it? A. Yes.

Q. (reading) "Was it arranged for you to take your car? No, sir, I suppose when he said, 'Take them' he meant take them in my own car."

Q. Do you remember that answer? A. Yes, sir.

Q. Now this question: "Was there any understanding just what they were going to do at that time?"

Q. Answer: "Well, not exactly. They says, 'There is some Camels going out on that train.' We says, 'All right.' "

Q. Do you remember that answer? A. Yes, sir; there is always Camels on that train.

Q. (reading) "That is about all you knew about it when you started? That is all I knew, yes."

Q. You answered that, didn't you? A. Yes, sir.

Q. That was true, was it not? A. What was the question?

Q. (reading) "That is about all you knew about it when you started? That is all I knew, yes."

Q. That Riley had told you there was some Camels going out on the train and for you to take the boys and go and make the train. That is all you knew about it at that time? A. That was in the early afternoon—four o'clock?

Q. No, that night just before you started out? A. No, that was four o'clock in the afternoon.

Q. You were up in the courthouse at four o'clock? A. That was down at this place.

Q. At Riley's place you say. After you had been around town you went down and he told you to take these boys and go down, didn't he? A. Well, I do not remember.

Q. You do not remember? A. No.

Q. But you were trying to tell General Griffith the truth, weren't you? A. Why, yes.

Q. Your answer was taken down just as you said it? A. Yes.

Q. You know that, don't you, Hayes? A. I do not remember what testimony he got there.

Q. You remember the court reporter? A. I do not know whether he was a court reporter or not.

Q. You know Massey, E. S. Massey, shorthand reporter, do you not? A. Yes, I know him.

Q. And didn't you say: "You went in your car? Yes, sir. And the three men that you have named were with you? Yes, sir."

Q. Do you remember making that answer? A. Yes.

"Where did you go? We went up on 10th and Minnesota and got a tail light bulb, the tail light burned out."

Q. Did you answer that? A. Yes.

Q. That was a fact? A. Yes.

Q. And you testified you got a tail light bulb? A. Yes, at 10th and Minnesota.

Q. That was on that night? A. Yes.

Q. That is after you started out from Riley's house, when you said McCarthy was crying about wanting to go along with you, and Riley said, "Take him along." A. Well, he was always crying about that, perpetually. He wanted, he always wanted to make some money.

Q. Crying perpetually. You were arrested in Charles Thompson's office? A. No, sir.

Q. Where were you arrested? A. Arrested at Kansas Avenue.

Q. What? A. Packard and Kansas Avenue, Kansas City, Kansas.

Q. You were not in the fracas when the agent was shot at Osawatomie? A. No, sir; I was not in that.

Q. That was Gladsen. Now, you had no motive in secreting anything when you testified for the Attorney General? A. No, sir.

Q. Your recollection was better then than it is now? A. Not much better. I can remember what went on.

Q. How many other robberies than you have named here had you been in? A. Oh, numerous, numerous.

Q. How many years had you been a common thief and bandit, a highwayman and a murderer? A. Well—

Mr. Seacat: Let the record show I object to that question, assuming here that this man was a murderer. That is an unfair question, Mr. Hackney.

Mr. Hackney: He can answer.

A. I have not been a murderer until I was convicted on this charge.

Q. That was the only charge of murder you have been convicted of? A. Yes.

Q. Never been convicted before? A. No, sir.

Q. How many highway robberies have you been in altogether; so many you could not keep track of them? A. No, not that many.

Q. How many bank robberies have you transported to? A. Four or five.

Q. How many payroll robberies? A. Two or three.

Q. How many ordinary stick up cases, holding up people on the street? A. Not many.

Q. You were engaged in that occupation? A. No, I never did rob a man on the street.

Q. You were in company with those who did? A. No, sir.

Q. Did you rob any stores? A. No, sir.

Q. You helped rob the Santa Fe? A. Yes.

Q. How many times? A. Oh, we didn't rob the Santa Fe much; two or three times.

Q. How many times altogether did you rob the Missouri Pacific? A. I have not got—too many—I do not recall.

Q. How many train riders were usually on a train? A. At first there were not any—maybe one; maybe none, but later on—

Q. In the last few years previous to the time David was killed? A. Well, two or three.

Q. Did you know a train rider named Boyd? A. Yes.

Q. You knew David, didn't you? A. No, I didn't know David.

Q. Did you know if Gladsen had some grudge against David? A. No, sir.

Q. You didn't have any grudge against David? A. No.

Q. You did not know Gladsen was going down to kill him that night? A. No.

Q. You boys had not made up a plan to kill anybody? A. No, we never done that.

Q. The guns were taken along to scare somebody? A. They were not taken to kill anybody.

Q. Did you have a gun yourself, you say? A. No, sir.

Q. You didn't have any gun? A. No, sir.

Q. The only thing you boys talked about in your various ~~talks~~ was about going down and robbing boxcars? A. Well, yes, we would go down and rob boxcars.

Q. You never planned to go down and murder train riders? Did any of your gang have a grudge against David at all? A. Well, I do not know.

Q. You had not heard of anybody—he had not shot any of them, had he? A. Yes.

Q. Who did he shoot? A. I do not know whether he shot anybody or not, but two or three months before that we had a shooting scrape at Nearman, Kansas.

Q. David was in it? A. I do not know. It is the same train. I do not know whether he was on it or not.

Q. Was anybody hit? A. Well, Masterson was hit four or five times.

Q. That was about how many nights before this occurrence when David was killed? A. A month I guess.

Q. It was a month before? A. Yes.

Q. David was a train rider a month? A. I do not know. I do not know how long he had been riding the train. I do not know anything about that. I do not know he rode it at all. I did not see him.

Q. Who did the shooting at Nearman? A. I do not know; the bulls did the shooting.

Q. Train riders, you mean? A. Yes.

Q. What do you call them, "Bulls?" A. Yes, sir.

Q. Did the thieves do the shooting? A. Well, I do not know.

Q. Were you armed that night? A. No.

Q. Who did have fire arms? A. Well Gladsen and Masterson had arms.

Q. McCarthy was not with you that night, was he? A. No, sir.

Q. Now, you testified on your trial that you did not know you had gotten to Leavenworth until you got there? A. Well, we had planned to rob the Missouri Pacific at that time. We planned to rob the Missouri Pacific pretty near every time we would go anywhere.

Q. You told the truth to Attorney General Griffith when you said Gladsen that night at Riley's house mentioned he was broke; also mentioned Red Loar was broke and wanted some money, and at that time you decided to go out and rob a car; is that a fact? A. Yes, because they just got out on appeal bond; it was understood they were broke; we knew they were broke.

Q. The talk you had with McCarthy when you started out was you were going to rob some box-cars; you didn't know just what box cars you were going to rob? A. He suggested—he suggested the Missouri Pacific himself.

Q. He suggested that to you, but you hadn't made any plan to rob any particular train until you started from Riley's house? A. Until we went down to the foot of Minnesota Avenue. We didn't know we were going to rob that train then.

Q. Why didn't you testify about that in there (indicating)? A. I did testify to that.

Q. Why didn't you tell that to General Griffith? A. I believe I told him that.

Q. How? Don't you know you testified you had no plan about robbing until you were down to Riley's house, and you were all together, and Riley says, "Take the boys and go in your car?"

A. Well, you see, I do not know that is the same testimony.

Q. You were trying to tell the truth—had as much motive to tell the truth in the presence of your father as you have in this case? A. Why certainly.

Q. When did Tolbert talk to you first? A. Two years ago.

Q. Were you here at the time Gladsen's deposition was taken? A. Well, I been here all the time Gladsen has been here.

Q. Gladsen's deposition was taken sometime over a year ago? A. I was here.

Q. You were here at that time? A. Yes.

Q. You were not called to testify that day? A. No, sir.

Q. Now, has anybody talked to you since that time? A. No, sir.

Q. Did you know Mrs. David wrote a letter to the Governor and asked for clemency for you boys? A. I do not remember nothing about it.

Q. You do not remember nothing about it? A. No, sir.

Q. Who handled the matter for you, what attorneys? A. I have no attorney.

Q. Do you know somebody down at Kansas City, or elsewhere who is looking after this matter —if, so, who it is? A. I do not know.

Q. Did anybody talk to you about making a statement? A. In regard to this case?

Q. Yes. A. Well, Mr. Seacat here.

Q. When? A. A week ago.

Q. Is that the first time you talked to anybody about the case? A. No, I talked to Bert about it.

Q. Bert Gladsen? A. Yes.

Q. Did you talk with Bert Gladsen after his deposition was taken? A. Yes.

Q. He told you what he had been asked, and what he testified? A. No, he didn't mention it.

Q. He didn't mention it? A. He just said—he told me—

Q. I am not asking that. I asked if he told you what he testified to? A. No, no.

Q. He didn't tell you what his testimony had been? A. Not calling for any statement.

Q. So you do not know what his testimony was? A. No, sir.

Mr. Hackney: I submit first Mr. Tharp's certified transcript.

Mr. Seacat: The only point is this: I don't want to encumber this deposition.

Mr. Hackney: I will have it marked "A" and attached to this deposition. I offer it as a part of the deposition. The other transcript I will have marked "B."

Mr. Seacat: That other may be a horse of a different color, Mr. Hackney (examining). It may be like Lincoln's almanac. It may go in for what it is worth. I have no objection to Exhibit "A."

Q. There is another question. Do you remember the result of your application for reduction of your sentence? A. What was the result?

Q. Yes, before the board of parole? A. I have never been up for executive clemency.

Q. Didn't you get a reduction of your sentence? A. No, sir.

Q. Did Gladsen? A. Yes, sir.

Q. Do you know what the reduction was? A. Yes.

Q. What was it? A. To fifteen years.

Q. Reduced from life sentence to fifteen years? A. Yes, sir.

Q. Do you know what Red Loar's reduction was? A. He never got a reduction.

Q. He never got a reduction. That is all.

Re-Direct Examination by Mr. Seacat.

Q. Mrs. David has never done anything in regard to helping you get a reduction of your sentence, as I understand it? A. No, sir.

Q. In the conversation with Mr. Tolbet and in the conversation with me, was any promise made to you that Mrs. David would assist you in getting your sentence reduced? A. No, sir.

Q. Do you have any motive in testifying at this time other than to tell the truth and facts as you now recall them? A. No, sir.

Q. How long has this gang been in operation, Hayes? A. Oh, for years.

Q. For years? A. Yes.

Q. How long had McCarthy been associated with the gang? A. Well, I do not know just exactly how long, at various times.

Q. Is it not a fact that at the time of this taking place, McCarthy was under sentence on conviction, for robbing the Missouri Pacific? A. Yes, sir.

Q. This statement has called attention to purporting to have been taken by the attorney

general in 1924, the testimony or whatever statements you made to the attorney general at that time was reported in shorthand? A. Yes, sir, I guess. I do not know.

Q. You do not know about that. After that conversation was the transcript of that submitted to you for approval? A. No.

Q. You never saw that statement after it was written up? A. Well, yes, I saw it. It just dealt with one case of highway robbery.

Q. But that is a complete statement, Mr. Hackney has? A. No, I never got it, or signed it or anything.

Mr. Seacat: I believe that is all.

Re-Cross Examination by Mr. Hackney.

Q. How did you come to make that statement when your father was present, the attorney general was present and these other gentlemen they have listed on that statement? A. Why?

Q. What was said about the purpose of it? A. Well, the purpose of it was to clear up Charley Thompson's part that he played.

Q. Well, you asked your father to come and be present, did you not, when your statement was given or was it the attorney general? A. I do not know. I do not believe I asked him.

Q. He came there. And you undertook at that time to answer truthfully every question asked by the attorney general? A. Yes, sir.

Q. Now, then, Hayes, McCarthy testified against you, didn't he? A. Yes, sir.

Q. In the preliminary? A. Yes, sir.

Q. And in your final trial when you were convicted and given 30 years? A. Yes.

Q. You heard him testify in the other cases? A. No.

Q. You learned he did testify? A. Yes, sir.

Q. Did you hear him testify in Loar's case? A. No, yes, I believe he testified in Loar's case.

Q. You learned he turned state's evidence as you thought? A. Yes, sir.

Q. Against you boys and turned the gang in? A. Well, no, he didn't. He didn't turn state's evidence.

Q. He testified against you, didn't he? A. He testified he was an officer. He testified he was an officer for the Missouri Pacific.

Q. He testified against you in your trial? A. Yes.

Q. You heard him testify all these things about going up there? A. Yes.

Q. About you taking him? A. Yes.

Q. And they arranged down at Riley's house that night to go up there after Bert said Red was broke and he was broke, and wanted some money? You heard him testify to that? A. Well, it was arranged two or three times.

Q. You heard him testify to that? A. I do not remember now.

Q. Regardless of what he testified you did not feel very kindly toward McCarthy? A. Oh, no, you would not feel very kindly towards him.

Q. Bert was mad at him, was he not? A. Yes, everybody was.

Q. And so was Red Loar? A. Yes, they felt like me.

Q. The rule among men engaged in banditry, bank robbery, and payroll robbery is to "bump

off'' in the common language of the underworld, any man who squawks, is that not the rule? A. Yes, that is the rule.

Q. So word has been given out since the trial of yourself among your gang to get McCarthy, if you could do it, has it not? A. Not that I know of. I guess—

Q. Would you testify McCarthy's life would be forfeited if he was found with your gang, anyway around Kansas City, Kansas? A. I imagine so.

Q. It would not be safe for McCarthy to stay in this country? A. Well, he has not.

Q. You know that? A. No.

Q. You do not know where he is. You have not had any communication with him? A. No, sir, but I have heard from him several times.

Q. You heard from him? A. Various ways, heard from him.

Q. How did you hear from him? A. Well, I have heard through different people.

Q. Through some men who have been in banditry? A. No, through some of his friends.

Q. Most of your gang are in the penitentiary? A. Yes, sir.

Q. How many of them are left out of the penitentiary now? A. One.

Q. Who is he? A. Masterson.

Q. Masterson. He is the one got shot down at Walcott? A. Yes, sir.

Q. Or Nearman instead of Walcott? A. Yes, sir.

Q. He was going to the doctor for treatment at the time of this train—attempted train robbery

and David was killed, was he not? A. Yes, sir, at that time.

Q. At that time he was suffering from his injuries, yet? A. No, it was not concerning that case at all; no, he didn't suffer from—I do not know what he—

Q. Had his injury healed from the shooting? A. That was not what he was going to the doctor for at all.

Q. But he was not able to go out that night? A. Oh, he was able. He figured it would be better to stay and see the doctor.

Q. You did no other acts of robbery than this attempted robbery here in Leavenworth? You were then taken into custody and kept in custody ever since? A. Yes, sir.

Mr. Hackney: That is all.

Re-Direct Examination by Mr. Seacat.

Q. About the shooting at this train, where did you say it was, Mr. Hackney? A. Nearman.

Q. Where is that? A. Beyond Walcott about six miles.

Q. Between Leavenworth and Kansas City? A. Yes.

Q. When did it take place? A. A month or so prior.

Q. Do you know or understand David was riding the train at that time? A. No, I have no way of knowing he was riding the train.

Q. The train rider at that time shot Masterson? A. Oh, they didn't shoot him; well, yes, they shot him four or five times, but nothing—never hit him in a vital place; just scratched his arm.

Q. Had there been any other violence in the three months preceding this occasion? A. No, sir, not that I know of.

Mr. Seacat: That is all.

Re-Cross Examination by Mr. Hackney.

Q. You remember you said the night of the 2nd of May, 1923, just two weeks before this attempted robbery at Leavenworth, you and your gang were up robbing those cars at Walcott? A. But there was no act of violence.

Q. There was no shooting that night? A. No, sir.

Q. You just held a gun on the brakeman, then robbed the cars and took the goods away? A. Yes, sir.

Q. But everybody in your gang was armed? A. Yes, sir.

Q. Even yourself? A. No, I was not armed.

Q. You were not armed? A. No, sir.

Q. How far from the cars were you when the robbery was occurring? A. Oh, right across a little ravine, about thirty feet.

Q. About thirty feet. You could see what was going on? A. Yes.

Q. You had no lights? A. Flashlights.

Q. All sort of lights there? A. No, we didn't need no lights.

Q. It was a moonlight night? A. Well, it was pretty clear.

Q. You could see the boys robbing the train? A. I could see the figures over there.

Q. You could see one man standing up against a telegraph pole? A. No, sir.

Q. Some fellow holding a gun on him? A. No.

Q. You know that was a fact? A. They said something about that later on.

Mr. Hackney: That is all.

Re-Direct Examination by Mr. Seacat:

Q. On that train robbery you learned that the brakeman was alongside of the telegraph pole? A. I do not know. I was not there.

Q. That is what you understood after the robbery? A. Yes, sir.

Q. Kept him covered with a gun while robbing the train? A. I think they robbed the first five or six box cars anyway by the time—they pulled down two or three cars. Our cars were loaded.

Q. You do not know of the occasion of holding the brakeman up against the telephone pole? A. No, I was not there.

Q. You do not know whether he resisted on that holdup or not? A. No, I do not know anything about that.

Q. What was your attitude toward a train rider who did resist? A. Well, you see—I never had no attitude. I never did rob any box car myself. I just used my car for transporting the stuff.

Q. These guns these other men carried were loaded? A. I do not know. I presume they were.

Q. Did you understand they would use them if occasion presented? A. Well, that is my—I thought they would anyway, because if they didn't what would they want them for.

Q. They would shoot their way out of trouble if they got into trouble? A. Yes, they carried them anyway.

Q. That is the purpose of carrying the guns?
Mr. Hackney: I object as leading.
Mr. Seacat: I think that is all.
(Witness excused.)
(Signature waived.)

Transcript as certified by Clark A. Tharp, official reporter for Leavenworth County, Kansas, under date of March 21, 1928, and introduced in evidence by the defendant was to the following effect:

"I am Lawrence F. Hayes, age 21, and am one of the defendants in this trial; I have known Bert Gladson all my life. I had never been associated with him in any crimes prior to the night David was killed; about 6 o'clock, I went down to George Riley's house to help him mix some paint for his garage that I had built. Ten or fifteen minutes before 7 that night, I took Harry McCarthy, Bert Gladson and Charles Masterson in my father's car for the purpose of taking Masterson to a doctor. I left them at a drug store and went to my mother-in-law's and took several of them out to my sister-in-law's then went back to the drug store and picked up Harry McCarthy and we drove down to the railroad tracks and got out and walked down by where some box cars were passing."

"Q. Was there anything said, any plan about robbing a train that night by you and Harry McCarthy?" "A. No, sir, not me."

"Q. What was said about the train?" "A. There was nothing said about robbing the train, he says, 'You might ride me around awhile tonight.'"

"I had been hiring the car out occasionally and he asked me if he could have the use of the car that evening and I said he could and went along to drive it. We went back for Masterson but the doctor had not arrived so at McCarthy's suggestion we started for Armourdale. We accidentally came across Bert Gladson on 10th Street and he got in the car with us. There was considerable conversation which I did not hear, and we later drove around and picked up Red Loar and then drove to Gladson's house, where he went inside and came back carrying a jacket. McCarthy then said he would make it right with me if he made some money. They directed me where to drive and pretty soon we stopped at a place which was somewhere near Leavenworth but I did not know where we stopped. When another car approached we drove down the road a couple of miles and then came back and waited for 35 or 40 minutes. When we heard a train whistle McCarthy and Gladson got out of the car and presently Gladson came back and whispered something to Loar. I noticed something was wrong and said:

'If you are coming up here to steal, I am going home,' and Loar and I left there about 10 minutes later; we drove back through the edge of Leavenworth to the car tracks and started for Kansas City and was not thinking about meeting McCarthy and Gladson, but we met them on the road and they rode home with us. When we got about at White Church on the way home, I heard something about trouble and that one of the guards or detectives had probably been shot; I did not have anything to do with trying to rob

any car or killing Mr. David and did not know him and never had the slightest idea before we got up here near Leavenworth that they were coming up here to rob a train."

On cross-examination he testified:

"When we went down to the railroad tracks in Kansas City, Kansas, I had no idea what he was going to do but told him I would drive him around in the car that night and expected him to pay me for it. McCarthy was talking to Masterson in front of the drug store and I waited in the car across the street; then McCarthy and I started for Armourdale and picked up Bert Gladson on the way. About 9 o'clock we picked up Loar and then went to Gladson's house. Gladson went in the house and brought out some clothing but I did not see any gun. At McCarthy's direction we drove towards Bonner Springs and turned north at Muncie and took various roads as McCarthy directed through part of Leavenworth, but I did not know it was Leavenworth at the time until they told me."

Prosecuting Attorney thereupon offered in evidence transcript of Hayes' testimony several days before the trial of Gladson for the murder of David which said testimony tended to prove that the witness knew before they went to Leavenworth that the gang expected to rob freight cars. But the witness, after denying in part such testimony and saying he did not remember the same, reiterated that he did not know that they were coming to Leavenworth to rob box cars. Witness further testified that he never saw any re-

volvers and did not know any guns were in his car.

In the District Court of Leavenworth County, Kansas. The State of Kansas, plaintiff, v. *Lawrence F. Hayes, defendant.* No. 6326.

Reporter's Certificate.

I, Clark A. Tharp, official reporter for the First Judicial District of Kansas, do hereby certify that the above and foregoing is a true, full and correct transcript of all of the evidence of Lawrence F. Hayes, taken by me in shorthand upon the examination of said witness in open court upon the trial of the above entitled case, which was begun on May 7th, 1923; said testimony of Lawrence F. Hayes was given on May 8th, 1923.

Clark A. Tharp,
Official Reporter, Leavenworth, Kansas.

"Report of a conversation on Sunday, January 20, 1924, in the office of G. M. Stringfellow, Sheriff of Leavenworth County, Leavenworth, Kansas."

Dated this 21st day of March, A. D. 1928.

LAWRENCE F. HAYES:

"I am a carpenter by profession and the first trouble I got into was a robbery of the Central Avenue Bank across from Armour packing house. We robbed the messenger as he was taking cash to another bank and used a car we had stolen the night before to carry us on this robbery. The next one was the Wilson Packing Company payroll robbery which Riley, Ward and I pulled off.

Masterson, Gladson and I pulled off the Turner Bank robbery where we held up their messenger on Kansas Avenue; that is all the jobs I was in except the box car robbery where David was killed."

Referring to the last mentioned robbery, during which David was killed, the transcript of said conversation (on pages 21 and 22 thereof) shows as follows:

"Q. Excepting this case. Now referring to the case on which you were convicted, who was with you on that case?" "A. Harry McCarthy and Bert Gladson and Nathan Loar."

"Q. Riley was not with you on that?" "A. No, sir."

"Q. Who framed this affair?" "A. Well, nobody framed this affair. At Bert's request we started out so he could get some money; he didn't have none, that is, I took Red Loar out."

"Q. At whose request?" "A. At Bert Gladson's."

"Q. At Bert Gladson's request you took Loar out. Where did you meet?" "A. Started to take him out here."

"Q. Didn't you know where you were going before you went?" "A. Well, I didn't know the roads very well; I was only up here one time."

"Q. Did you know what you were going after?" "A. No, sir, we didn't have anything in particular."

"Q. Sir?" "A. There was nothing in particular, just wanted to rob some box cars."

"Q. Where did you start from to this place where this man was killed?" "A. Started from Riley's house."

"Q. All right. How did you happen to be over at Riley's house?" "A. Oh, we all went down there and hang out down there."

"Q. When you went down to Riley's house did you know that you were going out on this work?" "A. Not until later on, until Bert told me that Red was broke and needed some money."

"Q. You went down to Riley's house the night before this man was killed here in this county?" "A. The same night."

"Q. The same night. And who was there at Riley's house?" "A. Harry McCarthy, Bert Gladson and I drove up there, and Harry McCarthy and Riley and Ward, and Thompson was all in there."

"Q. That is, Fred Thompson?" "A. Fred Thompson."

"Q. You have named all that were in the house?" "A. I think yes, that is all, besides his mother."

"Q. At the time you went over there you hadn't any idea about this particular deal?" "A. No, sir. I never had talked—"

"Q. Anyone come while you were there?" "A. I believe a fellow by the name of Phillips came while we were there."

"Q. What is Phillips' name?" "A. His name was, I don't know, he is a special agent for —Charles Phillips, special agent for the Santa Fe."

Mr. Seacat: We offer the plaintiff's Exhibit Three, which is the deposition of Mrs. Ada A. Riley, taken at 1016 South Coy Street in Wyandotte County, in the State of Kansas on the 17th day of

May, 1928, and I will now read the same to the jury. On page 4, that portion marked, is omitted.

Said plaintiff's Exhibit Three is in the words and figures as follows, to-wit:

MRS. ADA A. RILEY, of lawful age, produced, sworn and examined as a witness on behalf of the plaintiff, deposeth and saith:

Direct Examination.

Q. (by Mr. Seacat) Your name is— A. Ada A. Riley.

Q. You live at— A. 1016 South Coy Street.

Q. Mrs. Riley, do you know Bert Gladson? A. I certainly do, since he was a little boy.

Q. And Lawrence Hays? A. I am not very much aquainted; I knew him at that time I seen him many a time.

Q. Do you remember the occasion, Mrs. Riley, about five years ago, when a man named David was killed at Leavenworth? A. Yes, I remember about the killing. I don't know now when it was, but I remember about it.

Q. Do you recall, Mrs. Riley, seeing Bert Gladson and Lawrence Hays and Harry McCarthy the day before Mr. David was killed? A. Yes, they were all down here.

Q. What time did they come here? A. Well, I don't know what time but they were here off and on pretty near every day out there at that punching bag, and I remember seeing them come in the house, and McCarthy came in the house.

Q. Did you hear the conversation they had? A. No, not very much of it, I say he asked George and Freddy to go with him.

Q. Who was that asked Freddy to go with him? A. McCarthy.

Q. Bert was here at that time? A. I don't know whether he was in the house at that time; I don't think he was in the house at that time.

Q. Do you remember about what time of day that was? A. It was along in the evening, it wasn't dark, but it was sometime in the evening; along, I think, near supper time.

Q. Did they say where they were going? A. Well, now, they said something about where they were going. It was up here toward Leavenworth, I don't remember those places, because I am not acquainted. I heard George say, "I wouldn't go out there tonight for $50.00. You have made that place too much. It's hot. I wouldn't go out there for $50.00," so George didn't go and Freddy wouldn't go. He said, "Fred, let me have your gun." And he said, "No."

Q. Who said that? A. McCarthy. He said, "All right," and slammed the door after him.

Q. He and Bert and Lawrence left together? A. I don't know whether they did or not. They all went out there on the back; I suppose they did, I don't know; as far as I know they did.

Q. Have you seen McCarthy since that date? A. Not as I remember; I don't think I have.

Q. How long was it after that time, if you know, that Bert and Hays were picked up? A. Well, it wasn't but a day or two. I don't know when—Hays was picked up in a night or two. Mr. Hays called me up and said, "They have got Lawrence." Lawrence was picked up here at some store or pool hall, he said, "They have got Lawrence

and you tell George to try to get hold of Thompson to see if he can't get Lawrence out." That is the first I knew, I don't know when they got Bert.

Q. During that conversation, did they—did you hear McCarthy say to George, or George to McCarthy, what they were going to do that night? A. No, I never heard them say. Of course, George talked to me afterwards about it; said they were going out on the "Mop," the Missouri Pacific, they always said the "Mop."

Q. Did you hear McCarthy mention the "Mop"? A. He just asked the boys to go and George said he wouldn't go out there, of course George knowed what he meant. He said he wouldn't go out there.

Q. And that is about all you know about it? A. That is all I know about it.

Mr. Seacat: That's all.

Mr. Hackney: That's all.

(Witness excused.)

SOPHIA DAVID, being called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows, to-wit:

Direct Examination by Mr. Freet.

Q. State your name? A. Mrs. Sophia David.

Q. What is your age? A. Forty-two.

Q. What was your age on May 17th, 1923? A. Thirty-seven.

Q. You were the wife of James Lee David? A. Yes, sir.

Q. How long had you been married to him at the time of his death? A. About twenty-two years.

Q. How long had you lived in Kansas City, Missouri? A. At that time about twelve years —or ten years.

Q. Mr. David was shot and killed on May 17th, 1923? A. Yes, sir.

Q. Mrs. David, are you administratrix of the estate of James Lee David, deceased? A. Yes, sir.

Mr. Freet: I offer in evidence a certified copy—

The Court: (interrupting) I think it was admitted to start with.

Mr. Hackney: Yes. There is no use of putting that in or encumbering the record; it is conceded she is the administratrix.

Q. You are the administratrix of the estate and have been ever since shortly after he was killed under appointment by the Probate Court of Jackson County, Missouri? A. Yes, sir.

Q. How long had you lived in Kansas City prior to Mr. David's death? A. Ten years.

Q. Where did you live prior to that time? A. In Kentucky.

Q. In Kentucky, was Mr. David ever engaged in police work? A. No not in police work.

Q. He was employed in what capacity in Kentucky? A. Well, at different kinds of work; for different coal companies; he was weighman and at one time—he was usually weighing coal and in the store and doing then different kinds of work of that kind.

Q. About when did he go to work for the Missouri Pacific, with reference to the time of his

death? A. Sometime about the first of April, I think.

Q. As a train rider? A. Yes, sir.

Q. What was his salary at that time? A. $135.00 and expenses.

Q. One hundred and thirty-five dollars a month and expenses? A. Yes, sir.

Q. Now, how did Mr. David provide for you with respect to his salary? A. Well, he always provided everything for the home; I had no responsibility whatever.

Q. He used his entire salary for that purpose? A. Yes, sir.

Q. You had two children under age at the time of his death, were they not? A. No; they were not under age at the time; one was eighteen and the other was nineteen.

Q. One was eighteen and one was nineteen? A. Yes, sir.

Q. Were they living with you at the time? A. No; not right at the time. One of them had been.

Q. They were married? A. Yes; they were married.

Q. Now, since Mr. David's death, have you been employed? A. Yes, sir.

Q. Are you now employed? A. Yes, sir.

Mr. Hackney: We object to that as immaterial.

The Court: Objection overruled.

Mr. Hackney: To which we except.

Q. Where are you employed now? A. At the Kansas City Garment Company.

Q. What doing? A. I operate a power machine.

Q. You have never remarried? A. No, sir.

Q. You are still a widow of James Lee David? A. Yes, sir.

Cross Examination by Mr. Hackney.

Q. Mrs. David, do you know a—a Mr. Moore, the gentleman sitting back here (indicating)? A. Yes, sir.

Q. You knew him in Kentucky? A. Yes, sir.

Q. Was your husband in the employ of the Kentucky Coal Company as a guard about the time of the coal strike? A. Well, I don't know whether you could call it a guard or not; they had a valuable field there and they had Mr. Moore to look after the place for Mr. Moore and two or three others to stay at the place and they had powerful machine gun, with a headlight on the top of the building and his duty was to stay there and oversee that.

Q. Don't you know Mr. Moore was in charge of the men and that your husband was under Mr. Moore or in Mr. Moore's employ too? A. I don't know that he was in his employ—

Q. (interrupting) Well, he was working there at the time Mr. Moore was working there? A. Yes, sir.

Q. And he was armed a part of the time, wasn't he? A. No, sir.

Q. You say that he wasn't? A. No, sir, because he never had to leave the house and no one had to be armed in that house with a machine gun on the top of it and a search light.

Q. Who operated the machine gun? A. I don't know; different ones.

Q. Did your husband? A. No, sir.

Q. What was your husband to do there during that strike? A. Practically nothing.

Q. Was he employed for any purpose? A. Just to look after the house.

Q. Did he draw any wages?

Mr. Freet: Go ahead and finish.

A. He looked after the house and remained mostly in the dining room all night and whoever came in, he received them there. Mr. Moore wasn't there but very little of the time—he was in service most every place.

Q. Was your husband drawing a salary for his work? A. Yes, he had just been situated at the mines. We had been shut down and condemned and was looking after the machinery.

Q. Now, do you know of his working for the Pinkerton Detective Agency in 1911 to 1915? A. Yes, sir.

Q. Where did he do that work? A. In Kansas City.

Q. What was the nature of his work? A. He walked a beat for them.

Q. Walked a beat? A. Yes, sir.

Q. A guard sort of, here? A. Yes, sir.

Q. He was armed, then, wasn't he? A. Yes; he was armed then.

Q. Do you know when he was employed by the Missouri Pacific—do you remember the circumstances? A. Well, I don't remember of any particular circumstances of it.

Q. Your husband had an automatic revolver, didn't he when he worked for the Missouri Pacific? A. He had one belonging to the company.

Q. Well, an automatic revolver? A. I don't know nothing about it; I don't know.

Q. You know a sawed-off shotgun when you see it, don't you? A. Yes, sir.

Q. He had a sawed-off shotgun and revolver? A. He had a gun; he said it belonged to Mr. Boult.

Q. Well, what he said wouldn't be competent. A. He told me it belonged to Mr. Boult, and whether he had this revolver—the next day or so he brought this gun, I don't know.

Q. Anyhow, he kept those weapons with him during all the time he was working for the Missouri Pacific? A. Yes, sir.

Q. And you knew he kept them loaded, did you not? A. No; I do not know anything about that. I never thought of any such a thing.

(Witness excused.)

Mr. Freet: Mr. Hackney is admitting that Bert Gladsen is the same person as Albert Charles Gladsen who was tried in the District Court of Leavenworth County, Kansas, upon the charge of the murder of James Lee David on May 17th, 1923, and on that charge had a trial before a jury and was convicted of the crime of murder of said James Lee David and sentenced to life imprisonment in the Kansas State Penitentiary. Is that admitted?

Mr. Hackney: Yes.

Mr. Freet: That is our case. We rest.

Thereupon Mr. Hackney, counsel for the defendant, offered a demurrer to the plaintiff's evi-

dence in the nature of a peremptory instruction which is in words and figures following, to-wit:

The court instructs the jury, at the close of plaintiff's case, that under the pleadings and the evidence the plaintiff cannot recover and your verdict must be for the defendant.

(Refused.)

The Court: The requested instruction to find for the defendant is refused: it is in the nature of a demurrer to the evidence.

Mr. Hackney: To which we except.

Thereupon the defendant introduced its evidence in the following order, to-wit:

L. Q. MOORE, being called and sworn as a witness on the behalf of the defendant, testified as follows:

Direct Examination by Mr. Hackney.

Q. State your name? A. L. Q. Moore.

Q. Where do you live? A. In Kansas City, Missouri.

Q. What business are you in? A. I am special officer for the Missouri Pacific Railroad Company.

Q. How long have you been engaged in that or similar business with the Missouri Pacific, Mr. Moore? A. Eight years.

Q. Did you know James Lee David in his lifetime? A. Yes, sir.

Q. When did you first get acquainted with him? A. I got acquainted with him in about 1906 or '07.

Q. When did you get acquainted with him and where? A. Where?

Q. Yes? A. In Webster County, Kentucky.

Q. Did you have anything to do with employing him during that time in any capacity? A. Yes; on one occasion he worked for me a few months.

Q. When was that, according to your best recollection? A. It was either 1907 or 1908.

Q. Were you working for a coal company at that time? A. Yes, sir.

Q. Was the company having a coal strike? A. Yes, sir.

Mr. Freet: Object to that as incompetent, irrelevant and immaterial, a matter taking place in 1907.

The Court: Overruled. It goes to the experience of the deceased.

Q. (Mr. Hackney continuing examination) In what capacity were you employed by the coal company? A. I was special agent for the coal company.

Q. Was the company having serious trouble in protecting its property? A. Yes; they had quite a bit of trouble.

Q. In what capacity did you employ Mr. David? A. Well, he was on our payroll as a guard but he was stationed around a building—we used to call it "the Widow Croft Mansion" and Mr. David and his family were living there and they prepared meals for some of our guards and some of the soldiers there at that time.

Q. Do you know whether David carried a revolver during that time he was guard there? A. Yes, sir.

Q. Did you have occasion to see him use a revolver? A. Yes, sir.

Q. What was that occasion, Mr. Moore? A. Well, on one occasion he kept a fellow by the name of Henry Wellington from shooting me.

Q. He didn't shoot anybody? A. No, he prevented this fellow from—

Q. (interrupting) Now, when did you see David after that experience in Kentucky? When did you next see him? A. I saw him on the 18th of December, 1922.

Q. And what was the occasion of your meeting him, do you recall? A. I was going to work here down on Broadway and I met him down there and recognized him and he did me.

Q. Did you have any talk with David after that time about being employed by the Missouri Pacific? A. Yes, sir.

Q. Just state the conversation, Mr. Moore? A. Well, I asked him what he was doing, that day I met him, and he told me that he had been employed here and I told him if I had known he was here he probably would have been working with us. I didn't have long to talk to him then, and later on, probably three weeks or a month, I saw him again.

Q. Had you had an experience and had to go to the hospital in the meantime? A. Yes; I got shot that same night that I met him that afternoon.

Q. In what way? A. I was out in the railroad yards and I got shot in the lung.

Q. And did David call upon you at the hospital? A. No; he didn't but he came to my

room after I was able to go home in seventeen days.

Q. State the conversation you had with him about employing him—what he asked and what you told him? A. Well, I met him downtown several times, three or four times, and one afternoon I met him down town and he had a Ford car and we drove down and saw Mr. Barber, special agent for the Missouri Pacific, and he wasn't in—he was out of the office and we didn't see him on that occasion; and Mr. Barber and I drove out to his house the next day.

Q. Did David suggest to you he was looking for employment or would like to be employed by the Missouri Pacific Railroad Company? A. Yes, sir.

Q. In what capacity? A. As special officer, train rider, if a job was open.

Q. You saw him and you say arranged for him to meet Mr. Barber? A. Yes; we arranged it and I went down and he wasn't in that day and Mr. Barber and I drove out to David's house.

Q. Now, what conversation did you and Mr. Barber have with David out there at that time? A. Mr. Barber sat in the car—I went and found where he lived and went up and got him and met his wife and he came down, David and myself, and went over to the car and I introduced him to Mr. Barber and asked him if he was looking for employment and he said he was; he said he had a position open—

Q. (interrupting) State who that was said by? A. Mr. Barber asked him if he was look-

ing for a job or position and he said he was and Barber told him he had a position open as a train rider, and he told him, too, he didn't have long to talk. Then he had to go some place else and he told him he was having a good deal of trouble and he would have a good deal of trouble and asked him if he would fight those fellows and he said he would "until he died."

Q. What was said about there being frequent train robberies? A. I can't say just now.

Q. Well, you said something about fighting those fellows. Give Barber's language as well as you can? A. Well, he told him he had a lot of thievery on the road and robbers. He told him he had a position open as a train rider and he told him, too, he didn't have long to talk.

Q. (interrupting) Use Barber's language? A. Mr. Barber said, "We are having some trouble with a lot of train robbers" and he said, "there is a position open" and he says, "I want to know whether you will fight those fellows or not?"

Q. What did David say? A. He said, "I will fight them until I die." And he said "Come down and see me tomorrow" and we drove off.

Q. Did you then assist in making detailed arrangements with David about starting to work later on? A. Yes, sir.

Q. What was done about arming him? A. Well, Mr. Boult, the assistant chief special agent, had a forty-five automatic Colt, but there was something wrong with it and he loaned him the gun and I took the gun down to the gunsmith and had it repaired; it cost two dollars and a half.

Q. Was that weapon provided David? A. Yes, sir,

Q. Was he provided with any other weapon? A. Yes, sir; a number twelve shotgun with number one buckshot.

Q. What instructions were given David, if anything, about protecting himself and looking out for his safety?

Mr. Freet: We object to that unless it is shown to have been given in his presence.

Q. Well, was any instruction given in your presence? A. Well, I assigned David and Mr. Boyd in riding our trains between Kansas City and Leavenworth.

Q. What instructions were given him? A. I told him to be careful and to look out for those fellows and I gave him all the pointers that I could.

Q. State what you said about the danger, if anything, about dealing with those men? A. I told him they would shoot him just as quick as they saw him and to be awful careful and "watch your step" is about what I said to him.

Q. At, and previous to the robbery out there at Osawatomie in which Thompson had been shot, was that before that time or afterwards? A. That was before that.

Q. Did you explain anything to him about that? A. I don't know as that was mentioned.

Q. You provided this shotgun and revolver and turned them over to him for use? A. Yes, sir.

Q. Was it a Winchester Pump Gun or automatic? A. A Winchester Pump Gun.

Q. How much of the barrel was sawed off? A. I think it was a twenty-four inch barrel.

Q. It was cut down to that? A. Yes, sir.

Q. What, if anything, was fixed on there for him to carry the gun with? A. They had a leather strap to the gun—some did and some didn't. I think he had a little leather strap on his to throw over his shoulder so he could swing with his hands on the door of the train.

Q. How long did you remain after that, approximately in the service here in Kansas City? A. I left here—about three years—about three years on work.

Q. During that time you were working here, before you were taken to another station, did you see David at work? A. I saw him every morning when he came in.

Q. Did he have a sawed-off shotgun and revolver? A. At all times.

Q. At all times? A. Yes, sir.

Q. What did he say about them being loaded, if anything? A. Well, I think he told me—I had him try this gun out, the one we had worked over at the shop, and he said it worked all right. That was all that he said about the gun.

Q. What other train rider was used in connection with David? A. Harve Boyd.

Q. Do you know where he is? A. No, sir.

Q. Is he the same Boyd who was on the train the night David was killed? A. The same Boyd, I presume.

Q. Did Boyd go armed also? A. Yes, sir.

Q. Where were you transferred? A. Pueblo, Colorado.

Q. You left a few days after David's employment? A. Yes, sir.

Q. Did you see David after you left here before his death? A. No, sir.

Mr. Hackney: You may inquire.

Cross Examination by Mr. Freet.

Q. How long had you known Mr. David, Mr. Moore? A. Since 1906; shortly after I went to work for the Westchester Coal Company. He was weighing coal at that time.

Q. You saw him here in Kansas City all of the time he lived? A. Yes, sir.

Q. What time did you leave? A. I saw him on the 18th of December and I left this city on the 8th of April.

Q. And you had seen him in between times? A. Yes, sir.

Q. What was Mr. David's apparent health during all of that time? A. It was good.

Q. He was apparently an able bodied and well man, was he? A. Yes, sir.

Q. Are you still in the employ of the Missouri Pacific? A. Yes, sir.

Q. What is your position? A. I am special officer.

Q. Is that the same position you had at the time you introduced Mr. David to Mr. Barber? A. No, sir; I was night sergeant at that time.

Q. But you are in the same department? A. Yes, sir.

Q. How long have you been with the Missouri Pacific? A. Eight years and—eight years the 28th of this month.

Q. In the same department? A. Yes, sir.

Q. Now, Mr. Moore, have you also served as train rider? A. Yes, sir; I have ridden a few trains—not very much.

Q. As a matter of fact, there are frequently tramps found riding trains, aren't there? A. Yes, sir.

Q. Men who are just bumming rides from different points to different points, aren't there? A. Yes; that is true.

Q. And men who are not attempting to resort to robbery or crime of any kind—just trying to get a lift from one town to another? That is true, isn't it? A. Well, you can't tell what a fellow is doing when he is riding a train.

Q. Well, that is true, isn't it, that tramps and men are trying to get a lift from town to town and are found on trains from time to time? A. Yes, sir.

Thereupon the defendant produced as its next witness,

H. M. DOUGHERTY, who, after being first duly sworn, testified as follows:

Direct Examination by Mr. Hackney.

Q. You may state your name to the court and jury. A. H. M. Dougherty.

Q. What is your business? A. Train service; conductor in the employ of the Missouri Pacific.

Q. You were a conductor in the employ of the Missouri Pacific? A. I am now; yes, sir.

Q. Were you in May, 1923? A. I was a brakeman at that time.

Q. Where were you running at that time? A. From Kansas City to St. Joe.

Q. What train did you have? A. Train 173.

Q. Is that a freight train? A. Yes, sir.

Q. Were you on the train—did you know James Lee David, a train rider? A. Yes, sir.

Q. How long had you known him prior to his death? A. I had known him for some considerable time.

Q. You had known him for about how long? A. Well, I can't recall just how long I had known him.

Q. But you had known him for some considerable time? A. Yes, sir.

Q. Had he been riding that train you had been operating on previous to the night of his death? A. Yes, sir.

Q. How frequently did you see him in the month of May, 1923, riding that train? A. Probably every night he was riding it.

Q. Do you remember the circumstances of David's killing? A. Yes, sir.

Q. You were on that train, were you? A. Yes, sir.

Q. Was there any other train rider besides David? A. Yes, sir.

Q. And how many cars were in the train? A. Oh, probably fifty-five or sixty.

Q. And where was your station while the train was traveling? A. In the cab.

Q. Do you remember seeing David on the train that night previous to getting to Leavenworth? A. Yes, sir.

Q. Where was he when you first saw him? A. I think he boarded the train at A C Junction. That is over here at the state line where we pick up merchandise.

Q. State what gun he had, if any. A. He had a sawed-off shotgun and revolver.

Q. How far did he ride the caboose on that night? A. To Wolcott, Kansas.

Q. Then what became of him? A. I stopped at Wolcott and he went on up through the train and he stayed on the head end of the train from Wolcott.

Q. Had he been on the front end of the train or caboose? A. Up at Wolcott he got out of the caboose.

Q. Did you see him after that? A. Yes.

Q. David stayed on ahead after leaving Wolcott? A. Yes, sir.

Q. Is that the usual way for train riders to take their place in riding a train—for train riders to ride on the train? A. On our train one rode on one end and one on the other.

Q. Well, sometimes do they ride together? A. Well, sometimes they ride on the train and sometimes in the caboose.

Q. As you recall now, which was the next stop after Wolcott? A. South Leavenworth.

Q. Now, Mr. Dougherty, had you had any information about the robbery of that same train about two weeks previous to this night? A. No; I wasn't on it then.

Q. Did you hear about it? A. Yes, I heard about it.

Q. Going now, to the matter of the—after you left Wolcott you say Boyd was on the rear end of the caboose and David was up in front? A. Yes, sir.

Q. What did you do when you got to South Leavenworth? A. We took the passenger heading for the main line.

Q. Was that a meeting place that night? A. Yes, sir.

Q. Did you hear any shooting that night? Yes, sir.

Q. How long had you been on the passing track before the shooting occurred? A. Oh, probably ten minutes.

Q. When the shooting began, where were you? A. I was walking between the passenger track and the main line.

Q. And where was Boyd? A. Boyd was right behind me.

Q. Did you leave the caboose some distance behind at that time? A. Well, we probably left the caboose together.

Q. I mean how far were you from the caboose? A. Oh, about fifty cars, probably.

Q. You say back up the track about fifty cars? A. Yes, sir.

Q. How near were you to any of the places where the shooting occurred when the shooting occurred? A. Probably four or five car lengths.

Q. Did Boyd shoot any? A. Yes, sir.

Q. How many times? A. I can't recall that.

Q. Could you see anybody running away or was it too dark? A. No, sir; I could not see the seal.

Q. Did you go up to where David was then? A. Yes, sir.

Q. About how far from the engine was he back, was he, Mr. Dougherty? A. Oh, probably twenty-five cars; twenty to twenty-five. Somewhere along in there.

Q. What did you observe about David's condition? A. He was lying on the ground.

Q. Was he dead? A. Yes, sir.

Q. Did he have this sawed-off shotgun with him? A. Yes, sir.

Q. And his revolver? A. Yes, sir.

Q. Did you know whether David generally carried a flash light? A. Well, I wouldn't say whether he had one that night or not but they generally carry them.

Q. Do they have to use a flash light in examining the seals? A. Yes, sir.

Q. What do train riders do when the train stops? What work do they do? A. They would go over and examine the cars and seals.

Q. You didn't see anybody do the shooting at all? A. No, sir.

Q. Didn't see David when he was shot? A. No, sir.

Q. He was lying there dead, but you saw him? A. Yes, sir.

Q. And you were about 4 or 5 car lengths this side of where he was killed, were you? A. Yes, sir.

Q. Did you notice about the direction the shot struck him? A. Well, it appeared he was shot from someone standing up and ranged downward.

Q. I believe you said he was dead? A. Yes, sir.

Q. Was he shot in the heart? A. I don't know exactly in the heart; probably down in the chest somewhere.

Q. Well, you went to him just as soon as the shooting was over? You went right to where he was? A. Yes, sir.

Q. And he had no life in him at that time? A. No, sir.

Cross Examination by Mr. Freet.

Q. What first attacted your attention to the fact that anything unusual had taken place? A. Shots.

Q. You had neither seen nor heard anything up to that time? A. No, sir.

Q. Could you tell where the shots came from? A. No; I could not tell that.

Q. See the flash? A. No, sir.

Q. Was David lying on the same side of the train you were on? A. Yes, sir.

Q. When you found him? A. Yes, sir.

Q. And you hadn't seen any flash of the gun? A. No, sir.

Q. You just heard the reports? A. Yes, sir.

Q. And you went up to him? A. Yes, sir.

Q. And examined him? A. Well, I just looked at him there and to see whether he was dead.

Q. You saw where the bullet pierced his body? A. Yes, sir; I saw where the blood was pouring out.

Q. Had you had any information or warning of any kind that there was liable to be a robbery of the train that night? A. No, sir.

Re-Direct Examination by Mr. Hackney.

Q. How many shots did you hear? A. I heard two shots, and then there was some gentleman—

Q. Did Boyd shoot? A. He shot.

Q. He shot? A. Yes, sir.

Q. How many bullet holes were there in David? A. I didn't examine as to that.

Q. Were the two shots pretty close together? A. Yes, sir.

(Witness excused.)

C. M. BARBER, being called and sworn as a witness on behalf of the defendant, testified as follows, to-wit:

Direct Examination by Mr. Hackney.

Q. Mr. Barber, what is your name? A. C. M. Barber.

Q. What is your age? A. 58.

Q. What is your present occupation? A. Assistant chief special agent for the Missouri Pacific Railroad.

Q. That is, you are now occupying the position previously occupied by Mr. Boullt before his death? A. Yes, sir.

Q. Prior to Mr. Boullt's death and while you were at Kansas City, what position did you occupy? A. The position of special agent.

Q. State what your general duties were, Mr. Barber? A. The general duties were to employ proper men to guard for the company's property in the capacity of special officers.

Q. And you were at Kansas City how many years before David was employed? A. Well, I came there in October first, first in 1921.

Q. A mention is made in the deposition about your being transferred to St. Louis after the spring of 1923? When were you transferred to St. Louis? A. I was transferred to St. Louis March 1st, 1924.

Q. That is about ten months after Mr. David was killed? A. Yes, sir.

Q. Do you remember the circumstances of the employing of Mr. David? A. Fairly well.

Q. And what was it that first brought your attention to the fact that David desired a position with the company—who was it that first brought that to your attention? A. Mr. L. Q. Moore.

Q. The gentleman that just testified here this morning? A. Yes, sir.

Q. Mr. Moore was then in the service of the company? A. He was at that time acting as night sergeant for me.

Q. Now, do you recall the day you first had a talk with Mr. David about employing him as train rider and special officer? A. I don't remember the exact date; I remember the circumstances.

Q. State what conversation you had with David about what the dangers and his duties would be in that position? A. Mr. Moore brought David to the car where I was waiting and asked Mr. David if he was looking for a position as

special officer and he said he was looking for work. I told him the nature of the work that I wanted done.

Q. What did you tell him about the nature of it? A. I told him that we were having a great deal of trouble with a bad gang of train robbers robbing our trains en route and that I was looking for a man of sufficient ability to cope with them—a man who was not afraid to cope with them and a man who would shoot and use good judgment and watch things and if necessary to possibly catch them and after I had gone over the matter thoroughly with him he said "I will take the job" or words to that effect. I don't remember the exact words but the import of the conversation was as I have stated.

Q. Well, what explanation did you make about previous robberies or attempts to rob the train before that employment? Did you explain to him about those bandits robbing? A. I explained to him that they had been robbing the cars en route—throwing the stuff out en route and they were a large gang and a bad gang.

Q. Did you tell him that they were armed? A. Yes, sir; I did.

Mr. Frett: We object to that as leading.

The Court: Avoid leading questions.

A. I told him that all of them were armed and that all of them would shoot him on sight and that he had to be very careful.

Q. To be careful about what? A. About his own life.

Q. How long did you talk with David about employment? A. Well, at that time, probably ten minutes.

Q. Did he then come down to your office where you employed him. A. Yes, sir; a week later.

Q. You made out or assisted in making out the application for his employment? A. Yes, sir.

Q. And did he explain to you about previous police work he had had at various times? A. Well, as I recall it, he said he had some experience as a guard somewhere but I don't remember at that time where he said it was but it was in Kentucky somewhere and I believe he said he had experience as a marshal or watchman or something like that in Kansas City.

Q. Now, Mr. Barber, do you know about David's being given any firearms, if so, state what they were? A. Well, David was carrying a pistol and a sawed-off shotgun. They were given to him for the purpose of defending himself and the company's property.

Q. Was he given any instructions about carrying that regularly? A. Well, there was a general instruction out to all our men to carry their arms anywhere they go, anywhere they could get hold of them because they would—because they were told they would be liable to need them at any time.

Q. Was David told that? A. I don't remember whether David was specifically told that by himself but he was told and furnished the guns by Mr. Moore, my night sergeant.

Q. Now, then, previous to the time of David's fatal shooting, had you, about two weeks before, had you had a robbery up at Wolcott? A. Yes, sir.

Q. Was that on the train that David was riding? A. Yes, sir.

Q. Well, was David advised as to what occurred up there that night? A. Yes, sir; with others.

Mr. Freet: By you and Mr. Barber?

The Witness: I think by Mr. Moore, if I remember correctly. I called him in the office, come to think of it.

Q. Did you have a report in your office on the operators of the train? Do you know where David was that night and why he wasn't on the train? A. I think that is so; it was discussed.

The Court: If it was discussed you may state it. Did you get a report of why David wasn't on the train? A. Yes, sir.

The Court: What was that?

A. He had got left here at A C Junction that night by reason of having seen some robbers or thieves operating on some of the cars beside the tracks, and he got out to catch the thieves and the train pulled out and left him.

Q. That was about two weeks before his injuries? A. That was about fifteen days, I think.

Q. What, if any advice did you have from David on the subject or what investigation did he make on the subject? A. David had no investigation because he wasn't on the train and that was his explanation of why he wasn't on the train that he had gotten left.

Q. Do you know what part of the train the robber was on when this Wolcott robbery occurred that night? A. I don't know; I am not sure.

Q. Now, did Boyd usually ride the train with David? A. He was riding at that time, I believe.

Q. How was Boyd armed, if you know? A. Boyd went armed with a pistol but I am not sure whether Boyd carried a shotgun or not.

Q. He was on that train assisting David in protecting that train that night? A. Yes, sir.

Q. Did your train riders carry flashlights also in addition to the weapons? A. I think all of them did; they are all supposed to carry them.

Q. What would be the occasion of using a flashlight? A. Well, the use of a flashlight in that business is very little but occasionally it is very necessary. It is not necessary to examine the seals. They generally use them in order to protect their persons from hiding bandits along between the cars, but there are cases where you might find a door open and want to flash the light inside of a dark car to see what was the condition in it.

Q. Now, did you see David go out the evening before he was killed? A. I don't remember that.

Q. Well, had there been any other attempts to rob the train other than this Wolcott robbery about that time? A. Many; many.

Q. Did you tell him to carry this information to the train riders? A. Well, after every robbery I made it a point to talk to all our men engaged in that kind of business. What particular men I talked to, I don't know; but I made it a point to inform all of them of the facts so they could use the facts in protecting themselves and to better apprehend the thieves.

Mr. Freet: We object to that as argumentative and a conclusion and not shown that it was brought to the attention of Mr. David.

The Court: Objection sustained.

Mr. Hackney: To which we except.

Q. Mr. Barber, at the time of this killing of David, had any of those Kansas City, Kansas thieves been apprehended in any of their robberies that you know of? A. The two of them had been apprehended at Osawatomie, Kansas.

Q. Who were they? A. "Red" Lohr and Bert Gladsen.

Q. Was that the night that Dr. Thompson was shot? A. Yes, sir.

Q. Had Gladson been tried on the charge at Paola previous to this robbery at Leavenworth? A. Both of them had been tried and were out on the bond when the killing of Mr. David occurred.

Q. State, if you know, after you communicated—state whether or not you advised David of their conviction for those offenses? A. I don't remember. In all probability he was advised, but I don't know.

Mr. Freet: We object and ask that that be stricken out.

The Court: Sustained. Stricken out.

Q. Now, do you know Harold McCarty? A. Yes, sir.

Q. Did you know of his employment as informant by Mr. Mitchell and Mr. Boullt? A. I had heard of it.

Q. State whether or not anyone but yourself and Mr. Boullt and Mr. Mitchell knew about that employment?

Mr. Freet: Object to that as calling for a conclusion of the witness.

The Court: Sustained.

Q. State whether or not you advised the other special agents and train riders of the employment of Harry McCarty? A. I didn't.

Mr. Freet: We object to that unless it is shown it came to the knowledge of the deceased.

The Court: He said he didn't.

Q. You didn't advise anybody of the employment of Harry McCarty? A. No, sir.

Q. State the reason of that? Was it kept a secret or not? A. It wasn't calculated, on such cases—it wasn't calculated to come to the knowledge of anyone employed.

Q. Outside of the head men? A. Outside of the heads who employed them.

Q. Now, Mr. Barber, had you any knowledge of the purpose of Gladson and others of attempting to rob this train before David was killed? A. No, sir.

Q. When did you learn of the killing? A. I think it was early on the morning of the 17th.

Q. You had no previous knowledge of the matter? A. No, sir.

Q. Or of the intended robbery? A. No, sir.

Cross Examination by Mr. Freet.

Q. You say you talked with Mr. David probably about ten minutes before you employed him? A. Something like that.

Q. And Mr. David apparently was in good health? A. Yes, sir.

Q. And remained so as long as he was in the employ of the company? A. Well, Mr. David was a rather slight man and his appearance led

me, like some people, to believe that he wasn't in perfect health, but I didn't find any trouble with him.

Q. He attended to his duties regularly? A. Yes, sir.

Q. So far as you could tell he was always in good health? A. Yes, sir.

Q. How long had you known McCarty before David was killed? A. I never had known him at all.

Q. You had never come in contact with him in anyway? A. No, sir.

Q. Did you know of his employment? A. Not at the time.

Q. You didn't know anything about the facts that McCarthy had been employed prior to David's death? A. Oh, yes; I knew he had been employed prior to David's death but I didn't have anything to do with it and I wasn't in on the matter at all.

Q. How did you learn of his employment? A. I think from Mr. Boullt or Mitchell, I forgot which.

Q. And that was before Mr. David's death? A. I don't remember but I rather believe it was just about the time Mr. David was hired, if I remember right.

Q. But you had nothing to do with that? A. No, sir.

Q. Had you ever employed any thieves or robbers to act as snitches?

Mr. Hackney: We object to that as immaterial.

The Court: Objection sustained.

Q. Did you know of any other thieves or robbers that were employed as snitches at the time of Mr. David's death? A. Well, there is generally a great many of those character of people employed by different railroads, as you don't employ a preacher to catch a thief.

Q. Were they employed by the Missouri Pacific? A. No; not that I know of.

Q. Did you know of any other thieves and robbers being employed by the Missouri Pacific at that time? A. No, sir.

Mr. Hackney: Object—he has already answered the question.

The Court: He has answered it and he said "no."

Re-Direct Examination by Mr. Hackney.

Q. Mr. Barber, I overlooked asking you whether or not there was a report came to the Missouri Pacific or your department officers and yourself of an intended robbery out at Kenneth Junction some time previous to David's killing? A. Yes, sir.

Mr. Freet: We object to that as incompetent, irrelevant and immaterial.

The Court: He has answered it. Proceed.

(Witness excused.)

Mr. Hackney: We rest.

Mr. Freet: The plaintiff asks that the deposition of Patrick McCarty be marked Plaintiff's Exhibit Four, which I failed to have marked when I read it. That is all.

Mr. Hackney: We offer a demurrer to the plaintiff's evidence.

At the close of all of the evidence the defendant offered a demurrer which demurrer is in the words and figures as follows, to-wit:

The court instructs the jury, at the close of all the evidence, that under the pleadings and the evidence the plaintiff cannot recover and your verdict must be for the defendant.

(Refused.)

The Court: Under the rule of law that the employee assumes the ordinary risk of his employment, if the deceased, Mr. David, had been killed by train robbers just as an accident, no recovery could lie. The employment and undertaking of the deceased, David, was an unusually hazardous one and he assumed the usual hazards of that unusual hazardous position. His employment was a good deal like going to war and if he had been killed in the line of his employment, if he had met bandits and they had shot him—that is what he was employed to expect and face, and no recovery could be had because that was legitimate to employ people for that purpose. It is lawful to protect one's property, and it is lawful to resist force with force, then, protect law and property. So the employment by Mr. David was lawful; it was hazardous and he knew that and knowing it, understood it.

The question arises here, if they have an employee, if they have knowledge, whether it comes from the employee or from the outside, if they have knowledge of the unusual occurrence that is likely to arise, whether they haven't got to use all necessary means to notify the employee of that, to the end he might provide against it or

quit his employment or he might require additional protection.

It is an unusual case, and at first blush it would seem that the hazard was one of his employment and it would have been if the company had not received what amounted to a notice to them and notice to this convict or this stool pigeon, if they saw fit to employ so unworthy source of information, why are they not bound; or why is it not a question for the jury that they are bound by his lack of intelligence or lack of knowledge in not imparting the knowledge? It goes without saying if they retained the knowledge or this man knew—that is, had known and kept silent—the knowledge is imputable to them. It is a question of fact for the jury to pass upon. And you have very studiously and thoroughly gone into that, whether the information came to them at noon or at night; I think it is a question for the jury whether or not the defendant had knowledge within sufficient time, through McCarty, so he could have imparted to the defendant and they could have thereby warned the deceased and have taken steps to protect him. I am not clear about the matter but I think that this is a question for the jury.

Entertaining this view, the demurrer is overruled.

Mr. Hackney: To which we except.

The Court: Now, what about the instructions?

Mr. Hackney: The defendant objects to each and every instruction given by the court, either on the court's own motion or at the request of plaintiff on plaintiff's behalf. The defendant excepts

to the refusal of the court to give each instruction asked by the defendant and refused by the court. The defendant excepts to the modification of each of its instructions asked by the defendant and modified by the court and which were given by the court as modified.

Mr. Freet: The plaintiff objects to each and every instruction given by the court at the request and on behalf of the defendant and also objects to each and every instruction offered by the defendant and modified by the court and given to the jury as modified.

At the conclusion of all the evidence in the case the court instructed the jury as to the law in the case on behalf of and at the plaintiff's request, as follows:

1.

The court instructs the jury that it is admitted by both parties to this suit that James Lee David was in the employ of the defendant in interstate commerce as train rider on May 17, 1923. You are further instructed that if you find and believe from the evidence that on and prior to said May 17, 1923, one McCarthy was in the employ of the defendants as an informant, and if you further find that said McCarthy, on the 16th day of May, 1923, was informed and knew that certain persons planned and intended to rob a certain train of the defendant at Leavenworth, Kansas, in the early morning of May 17, 1923; and if you further find that said McCarthy knew that said persons intended to be armed with firearms at the time of such intended robbery, if you

so find; and if you further find that said persons, if you so find, did go to Leavenworth, Kansas, and did approach the train of defendant upon which said David was employed, for the purpose of robbing the same and that said David had no knowledge of said intended robbery, if you so find, and if you further find that said McCarthy knew of said intended robbery, if you so find, in time, by the exercise of ordinary care and with safety to himself to have warned said defendant and for defendant thereafter to have *warned* James Lee David of such intended robbery; and if you further find that said McCarthy negligently and carelessly failed to report said information if you so find to the defendant; and if you further find that as a result of such negligence and carelessness, if you so find, the said James Lee David was shot and killed in the early morning of May 17, 1923, by one of the persons known by said McCarthy to have been among said persons who intended said robbery, if you so find, and while attempting to carry out the plan and intent to rob said train, if you so find, and if you further find that the plaintiff, Sophia David, was the wife and is now the widow of said James Lee David, and administratrix of his estate, then your verdict will be for the plaintiff and against the defendant, and you will assess plaintiff's damages in such an amount as will fairly and reasonably compensate the said widow of said James Lee David for the loss of pecuniary benefits which she might with reasonable certainty have received if said James Lee David had not been killed; and in fixing the amount of such damages, if any the jury may

take into consideration James Lee David's age, his probable expectancy of life, health, physical condition, earning power, and also the age and probable expectancy of life of his said widow."

(Given.)

To the giving of the above instruction the defendant excepted at the time.

2.

"The court instructs the jury that by the term 'ordinary care' as used in these instructions is meant that degree of care which an ordinarily prudent person would have exercised under the same or similar circumstances. By the words 'negligence' and 'negligently' as used in these instructions is meant failure to use such ordinary care."

(Given.)

To the giving of the above instruction, defendant excepted at the time.

At defendant's request, the court gave the following two instructions, numbered 3 and 4:

3.

"There is no evidence of any understanding or agreement between Gladsen and McCarthy to the effect that David was to be shot and killed by Gladsen, nor is there any evidence that McCarthy, prior to the fatal shooting of said David had any knowledge of the purpose and intent on said Gladsen's part to shoot and kill said David."

4.

"Even though the jury may find from the evidence that the defendant's officers and agents

employed one McCarthy as an informer on car thieves and train robbers, and that prior to and at the time of such employment they knew that said McCarthy was a car thief, train robber, convict or ex-convict, yet such employment by them of McCarthy as such informer was not unlawful; and the defendant is not by reason of such employment liable for the act of McCarthy in accompanying Gladson and others in an attempt to rob the train on which David was train rider, nor for the act of said McCarthy in being present at the time and place of the fatal *shooting* by Gladson of said David."

The defendant asked the court to give the following instruction, to-wit:

F.

"The court instructs the jury that if you find from the evidence that the deceased, James Lee David, was employed by the defendant as a special agent and train rider, for the purpose of protecting defendant's trains from car thieves and train robbers, and that he was warned that train robberies were frequently being perpetrated, and that attempts to rob the cars of the defendant's trains were likely to occur at any time and place, and that said David was instructed to arm himself with firearms and be constantly on the lookout for such thieves and train robbers, and to look out for his own safety and to protect himself against such thieves and train robbers, and if you further find that said David agreed so to do; and if you further find that at the time of

his fatal injury said David was armed with and was then and there carrying on his person a loaded revolver and a loaded sawed-off shotgun so as to protect himself, then the said David voluntarily assumed the risk of injury from thieves and train robbers, and your verdict must be for the defendant."

The above instruction asked by the defendant was refused by the court, and thereupon the court modified said instruction by adding thereto the following paragraph, to-wit:

"Unless you find and believe from the evidence that McCarthy, the then employee of defendant, had knowledge of such intended train robbery a sufficient length of time before said attempt to have, with safety to himself, warned the defendant and the defendant thereupon to have warned David of said intended train robbery in time for said deceased, David, to have taken steps, if any, to further protect himself therefrom."

Thereupon the court gave said instruction, so modified as No. 5, to which action and decision of the court, in refusing to give said instruction as asked by the defendant, and in modifying and giving the same as modified, the defendant then and there excepted at the time.

The defendant then asked the court to give the following instruction:

G.

"The court instructs the jury that if you find from the evidence that the deceased David

was, prior to his fatal injury, warned by defendant's officers that as train rider he should at all times be on the lookout for thieves and train robbers, and that he should arm himself with a loaded revolver and loaded sawed-off shotgun, so as to cope with such thieves and train robbers, and that on the night of his fatal injury he was so armed, then the plaintiff cannot recover, and your verdict must be for the defendant."

Which instruction the court refused to give as asked, and thereupon the court modified said instruction by striking out in the last sentence thereof the words, "then the plaintiff cannot recover, and your verdict must be for the defendant," and by inserting in lieu thereof the words, "then the deceased assumed the ordinary dangers, risks and hazards of such employment," and gave said instruction so modified as Instruction No. 6, to which action and decision of the court in refusing to give the instruction as asked by the defendant, and in modifying same, and in giving same as modified defendant then and there excepted at the time.

The court then gave the following additional instructions:

7.

"There is no evidence as to how or why David was shot, nor what if anything he did to provoke such shooting.

8.

"You are instructed that nine or more jurors may render a verdict for either party in this

case. If all of you agree upon a verdict, your foreman alone will sign it, but if your verdict is rendered by nine, or more, and less than twelve jurors, your verdict must be signed by all of the jurors who agreed to it."

Forms of Verdict.

"If all of you agree upon a verdict for the plaintiff, it may be in the following form: 'We, the jury, find the issues for the plaintiff, and do assess her damages at ..... dollars. (Stating the amount).

..... Foreman.'

"If a less number than twelve jurors render a verdict for the plaintiff it may be in the following form: 'We, the undersigned jurors, find the issues for the plaintiff, and do assess her damages at ..... dollars' (stating the amount)."

"If all of you agree upon a verdict for the defendant, it may be in the following form: 'We, the jury, find the issues for the defendant.

..... Foreman.'"

"If a less number than twelve jurors render a verdict for the defendant, it may be in the following form: 'We, the undersigned jurors find the issues for the defendant.'"

"These forms are given for guidance only and your verdict should be written on a separate paper, and not on one of these instructions."

Thereupon the defendant prayed the court to give the following instructions, to-wit:

(C)

"The court instructs the jury that there is no evidence in this case from which the jury would be justified in finding that had there been additional armed train riders or officers on the train on which David was train rider on the night of his fatal injury, that the presence of such additional train riders or officers would have prevented the fatal shooting of said David."

(Refused.)

(D)

"The court instructs the jury that there is no evidence from which the jury can find that had James Lee David been warned that Gladson and others intended to attempt to rob the train on which he was acting as train rider, that he would have acted in anywise different from what he did act at the time of his fatal injury, nor that any such warning, if it had been given, would have prevented his fatal injury."

(Refused.)

(E)

"The court instructs the jury that there is no evidence of any negligence on the part of the defendant, in the performance of any duty it owed the deceased, James Lee David, and your verdict must be for the defendant."

(Refused.)

Which said instructions, so prayed by the defendant as aforesaid, the court refused to give to which action and ruling of the court in refus-

ing to give said instructions, the defendant then and there duly excepted at the time and still excepts.

Thereupon, at the conclusion of the arguments of counsel, the case was given to the jury, and in due time, and on the 19th day of June, 1928, the same being the 31st day of the regular May, 1928, term of said court, the jury returned a verdict in favor of plaintiff, upon which judgment was entered accordingly.

Said verdict is in the words and figures as follows, to-wit:

"We, the jury, find the issues for the plaintiff, and do assess her damages at fifteen thousand dollars ($15,000.00).

(Signed) Stanley S. Stone,
Foreman."

Endorsed on the back of said verdict is the number of the case, style, character of the document and the following:

Filed Jun 19 1928 Lynn G. Buford, Clerk By John Bolefahr, Deputy.

And afterwards, on the 20th day of June, 1928, the same being the 32nd day of the regular May, 1928, term of said court, at the same term and within four days after the rendition of the verdict the defendant filed herein a motion for a new trial which is in the words and figures as follows, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City. Division No. 8. May Term, 1928. Sophia David, Administratrix of the estate of James Lee David, Deceased, Plaintiff, vs. Missouri Pacific Railroad Company, a corporation, Defendant, No. 209164.

Motion for New Trial.

Now comes the defendant and moves the court to set aside the verdict of the jury and to grant the defendant a new trial in the above entitled cause for the reasons following to-wit:

1. Because the court erred in admitting improper and illegal evidence on behalf of the plaintiff.

2. Because the court erred in excluding proper and legal evidence offered by the defendant.

3. Because the court erred in refusing the defendant's demurrer to the evidence and request for a directed verdict for the defendant offered at the conclusion of the plaintiff's evidence.

4. Because the court erred in refusing to give the defendant's demurrer to the evidence and request for a directed verdict for the defendant offered by the defendant at the conclusion of all the evidence.

5. Because the court erred in giving each of the instructions given by the court on behalf of the plaintiff.

6. Because the court erred in giving each of the instructions on behalf of the plaintiff as modified by the court.

7. Because the court erred in refusing each of the instructions asked by the defendant and refused by the court.

8. Because the court erred in modifying each of the instructions asked by the defendant which were modified by the court and in giving each of said instructions as so modified by the court and in refusing to give the said instructions in their original form as asked by the defendant and without modification.

9. Because the evidence is insufficient to support the verdict.

10. Because the verdict is against the evidence.

11. Because the verdict of the jury is based on conjecture, speculation and guess work and not on sufficient legitimate evidence to justify the said verdict.

12. Because the verdict of the jury is against the law.

13. Because the verdict of the jury is against the instructions of the court.

14. Because the verdict of the jury is against the weight of the evidence.

15. Because under the law and the evidence the verdict of the jury should have been for the defendant.

16. Because the verdict of the jury is excessive in amount.

17. Because the verdict of the jury is based on bias, passion, sympathy and prejudice of the

jury in favor of the plaintiff and against the defendant.

(Signed) HACKNEY & WELCH,
Attorneys for Defendant."

Endorsed on the back of said motion for new trial is the number of the cause, style, character of the document and the following:

Filed, Jun 20 1928 Lynn G. Buford Clerk by John Bolefahr Deputy.

And afterwards, on the 20th day of June, 1928, the same being the 32nd day of the regular May, 1928, term of said court at the same term, and within four days after the rendition of the verdict, the defendant filed herein a motion in arrest of judgment, in the words and figures as follows:

"*In the Circuit Court of Jackson County, Missouri, at Kansas City. Division No. 8. May Term,* 1928. *Sophia David, Administratrix of the Estate of James Lee David, deceased, Plaintiff, vs. Missouri Pacific Railroad Company, a corporation, Defendant. No.* 209164.

Motion in Arrest.

Now comes the defendant and moves the court to arrest the judgment in the above entitled cause for the reasons following to-wit:

1. Because the plaintiff's amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

2. Because the record is insufficient to support the judgment.

3. Because on the whole the judgment is erroneous and cannot stand.

(Signed) HACKNEY & WELCH,
Attorneys for Defendant."

Endorsed on the back of said motion in arrest of judgment is the number of the cause, style, character of the document and the following:

Filed Jun 20 1928 Lynn G. Buford, Clerk by John Bolefahr Deputy.

And afterwards, on the 30th day of June, 1928, the same being the 41st day of the May, 1928, term of said court, the said defendant's motion for a new trial was taken up and submitted to the court, and having been by the court seen and heard, and duly considered, was by the court overruled; and to which action and ruling of the court in overruling said motion, and in refusing to grant the defendant a new trial herein, the defendant then and there duly excepted at the time and still excepts.

And afterwards, on the 30th day of June, 1928, the same being the 41st day of the May, 1928, term of said court, the defendant's motion in arrest of judgment was taken up and submitted to the court, and having been by the court seen and heard, and duly considered, was by the court overruled; and to which action and ruling of the court in overruling said motion and in refusing to arrest the judgment herein the defendant then and there duly excepted at the time and still excepts.

And afterwards, on the 7th day of July, 1928, the same being the 46th day of the regular

May, 1928, term of said court, the defendant filed herein its application and affidavit for appeal in words and figures as follows, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City. May Term, 1928. *Division No.* 8. *Sophia David, Administratrix of the Estate of James Lee David, deceased, Plaintiff, vs. Missouri Pacific Railroad Company, a corporation, Defendant. No.* 209164.

Affidavit for Appeal.

Thomas Hackney, being duly sworn, makes oath and says that he is attorney and agent for the defendant, and that the appeal prayed for in the above entitled action is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment and decision of the court.

(Signed) Thos. Hackney,

Subscribed and sworn to before me this 2nd day of July, 1928.

(Seal) (Signed) Pearl Cramer,
Notary Public.

My commission expires May 23rd, 1929."

Endorsed on the back of said affidavit for appeal is the number of the cause, style, character of the document and the following:

Filed Jul 7 1928 Lynn G. Buford, Clerk By John Bolefahr Deputy.

And afterwards, on the 7th day of July, 1928, the same being the 46th day of the regular May, 1928, term of said court, the defendant's application and affidavit for appeal was by the court sus-

tained, and appeal allowed, as prayed, to the Supreme Court of the State of Missouri, and the defendant thereupon granted leave to file its bill of exceptions in this cause until on or before the last day of the regular September, 1928, term of this court. Defendant's appeal bond is by the court fixed in the sum of thirty-one thousand ($31,000.00) dollars which is now filed herein and by the court approved.

Wherefore, defendant prays the court to settle and allow this its bill of exceptions to all and singular the acts, rulings and orders of the court in the premises, and that the same may be signed, filed and made a part of the record herein.

Now, therefore, the court, being fully advised in the premises, doth find the foregoing to be a correct bill of exceptions taken and saved on behalf of the defendant herein, and doth now sign the same, and doth order that the same may be filed and made a part of the record in this cause.

Given under the hand of the Judge of said court before whom said proceedings were had, on this 4th day of January, 1929.

RALPH S. LATSHAW,
Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Division No. 8.

We hereby consent that the foregoing is a full, true and correct Bill of Exceptions on behalf of the defendant herein, and agree that the same may be signed, filed and made a part of the record in this cause.

ROSENBERGER, MCVEY & FREET,
Attorneys for Plaintiff.

HACKNEY & WELCH,
Attorneys for Defendant.

[fol. 219]

IN THE SUPREME COURT OF MISSOURI.

[Title omitted]

SUBMISSION OF CAUSE—April 23, 1930.

Come now the parties by their respective attorneys and after arguments herein, submit this cause to the Court.

[fol. 219]

IN THE SUPREME COURT OF MISSOURI.

[Title omitted]

JUDGMENT—June 24, 1931.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in the form aforesaid, by the said Circuit Court of Jackson County, rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant her costs and charges herein expended and have therefor execution. [Opinion filed.]

[fol. 220]

IN THE SUPREME COURT OF MISSOURI,
DIVISION ONE.

[Title omitted]

OPINION.

This case comes to the writer on reassignment, having originally been assigned to one of our com-

missioners for the preparation of an opinion. It is an action under the Federal Employer's Liability Act to recover damages for the death of James Lee David, alleged to have been caused by the negligence of the defendant. David was in the employ of defendant as a train rider. Whilst engaged in the discharge of the duties incident to his employment, in the early morning of May 17, 1923, he was shot and killed by one Bert Gladsen, a train robber, who had gone to the place where the train under David's protection was standing for the purpose of breaking into and stealing from the box cars. The trial in the Circuit Court resulted in a verdict for plaintiff for $15,000. The cause comes to this Court on defendant's appeal.

> "It was admitted that David, when killed, was in the line of his duty, that his work was interstate commerce, and no question was raised as to the plaintiff being the administratrix of his estate. The sole question presented in the trial court and pressed here is whether or not any negligence of the defendant was shown and if so, whether it was the proximate cause of David's death" [Appellant's Brief].

The statement of the facts will be limited accordingly.

In April, 1923, the appellant was being "harassed, annoyed and robbed" by an organized gang of thieves, in and adjacent to Kansas City; it was being "robbed" every week around Kansas City; robberies had occurred at Leavenworth, Atchison, Stillwell, Osawatomie and Paola, in Kansas, and at Pleasant Hill, and Raytown, in Missouri. The thieves,

who were reported to be "bad men" who would shoot their way out of trouble when confronted with it, specialized in looting box cars carrying certain kinds of merchandise. Their depredations were not confined to any particular trains or runs, nor would they occur every night; they happened sporadically, yet frequently, at some point in the territory just referred to.

David was employed as a train rider on or about April 1, 1923. As such he was under the immediate supervision of appellant's divisional special agent at Kansas City by whom he was assigned to trains as and where needed. It was his duty to examine the seals of the car doors and see that they were intact and that the train was all right, both before departure and en route. In a general way he was to protect the train. There was no fixed rule about where he should ride on a train. He could ride in the caboose, in the engine cab or in a box car, as his judgment might dictate. With respect to the information and instructions given him at the time of his employment appellant's then special agent, C. M Barber, testified:

> "I told him that we were having a great deal of trouble with a bad gang of train robbers robbing our trains en route and that I was looking for a man of sufficient ability to cope with them—a man who was not afraid to cope with them and a man who would shoot and use good judgment and watch things and if possible catch them, and after I had gone over the matter thoroughly with him he said, 'I will take the

> job' or words to that effect. * * * I explained to him that they had been robbing the cars en route—throwing the stuff out en route and they were a large gang and a bad gang. * * * I told him that all of them were armed and that all of them would shoot him on sight and that he had to be very careful.
> "Q. To be careful about what?
> A. About his own life."

David was given a pistol and a sawed-off shot gun for the purpose of defending himself and the company's property. He was also given a flashlight. With respect to its use Mr. Barber testified:

> "Well, the use of a flashlight in that business is very little, but occasionally it is very necessary. It is not necessary to examine the seals. They generally use them in order to protect their persons from hiding bandits along between the cars, but there are cases where you might find a door open and want to flash the light inside of a dark car to see what was the condition in it."

Prior to his employment as a train rider David had had some experience in police work of a special character. In 1907 he had served as a guard to protect the property of a coal company during a strike by its employes. From 1911 to 1915 he worked for the Pinkerton Detective Agency, in Kansas City; "he walked a beat for them * * * a guard sort of * * * he was armed."

At the times first mentioned, appellant maintained a departmental organization for special service. The special service performed by it was essentially police

work, having for its objective the protection of both the property of the railroad and that entrusted to it for transportation. The head of the special service organization, styled Chief Special Agent, was R. S. Mitchell. Mr. Mitchell's headquarters were in St. Louis. An assistant chief special agent, W. H. Boult, maintained headquarters in Kansas City.

About the time David entered appellant's employ one McCarthy was also employed for the special service. McCarthy was a member of the gang of thieves against whose depredations the appellant was making strenuous efforts to protect itself. With respect to the nature and terms of the employment Mr. Mitchell testified:

> "I talked with McCarthy probably two or three hours [at the Baltimore Hotel in Kansas City], at which time he told me the history of the robberies committed by this gang; he told me at that time who was acting as head of the gang, who was furnishing the brains for these thieves, and he told me a great many details in connection with these robberies; he told me that he was trailing with the gang and he wanted to get away from them. I arranged with him to keep us informed as to the activities of this gang, to give us advance information, if possible, when this gang planned to rob our trains, and further arranged with him, in the event he could not get to us, couldn't give us advance information, to give us information then as to the fence where the stuff was taken, as well as who was in the robbery, and all the details possible. Now, after I had satisfied myself that McCarthy knew what he was talking about, and I believed he could do what he contracted to do, I arranged with him to pay him

one hundred and fifty dollars a month for that sort of service, and then I called in my assistant, Mr. W. H. Boult, and I introduced Boult to McCarthy, and arranged with McCarthy his way of reporting to Mr. Boult, and left the matter in Mr. Boult's hands.

* * * * * * *

"He reported to Mr. Boult by 'phone; that was the arrangement made at that time, and if it was necessary to arrange a meeting, he was to arrange a meeting by 'phone.

"Q. He knew how to get hold of Mr. Boult?

A. Yes, night and day service.

"Q. And where he could reach Mr. Boult at any time if he might want him?

A. Yes, sir."

It was understood, however, that McCarthy was not to report an intended robbery unless he could do so without uncovering himself to the gang.

Following his employment McCarthy reported to Boult from time to time the plans and doings of the gang. On one occasion he reported that they intended robbing a train at Kenneth Tank, in Kansas [twenty-five miles out from Kansas City]. He made the report about five o'clock in the afternoon; the robbery was to take place that night. Thereupon a warning was sent out to the riders and the crew of the train, and an automobile load of special officers, with the aid of the local police, covered the place of the intended robbery during the night. The plans of the robbers miscarried, however, and they never left Kansas City, Kansas.

On May 16, 1923, one of the gang was on trial for robbery in the District Court in Kansas City.

Kansas. A number of his associates, including McCarthy, were in attendance as spectators. They were in and around the court room throughout the day. At the noon hour one of them suggested that they rob a merchandise train of defendant when it reached Leavenworth that night—the train was due there at about 1:30 in the morning. The matter was discussed by them at intervals during the afternoon, they finally agreeing to get together that evening at the house of one Riley. They met at Riley's at about 6:30 P. M. After further discussion there of the plan which had been taking form during the afternoon it was definitely agreed upon, although some of them declined to participate; having robbed this particular train at the same place several times before they were of the opinion that it was too "hot."

Pursuant to the plan just mentioned, four of the gang, Bert Gladsen, Red Loar, Lawrence Hayes and McCarthy, left Kansas City at ten o'clock that night for Leavenworth. They left in an automobile and reached Leavenworth about 11:15. They stopped at an old sugar refinery about a half block from the Missouri Pacific tracks and waited for the train—about an hour or an hour and a half.

On arriving at South Leavenworth the train took a siding to clear the main track for a passenger train and stopped.

When the train whistled at Leavenworth, Gladsen and McCarthy got out of the waiting automobile, and Loar and Hayes drove away. It was the plan that the former would break into the cars at South Leaven-

worth, get the merchandise ready and throw it out at a particular crossing previously agreed upon in the north end of the town, where the other two with the car would meet them and return with the loot to Kansas City.

On leaving the automobile Gladsen and McCarthy went over to the railroad tracks, climbed upon the train and rode down into the yards to the place where it stopped. They were both armed and McCarthy had a pinch-bar, the breaking tool.

After the train had been standing probably ten minutes, Dougherty, the conductor, and Boyd, also a train rider, left the caboose and proceeded forward between the main line and the passing track. Boyd was behind Dougherty. When they reached a point twenty-five or thirty car lengths from the engine, they heard two shots, fired close together; the place of the shooting was four or five car lengths ahead of where they were. Dougherty proceeded ahead and found David lying on the ground dead. He testified, "It appeared that he was shot [in the chest somewhere] from someone standing up and ranged downward." David fell between twenty and twenty-five car lengths from the engine, where he had been when the train stopped, and on the same side of the train where Dougherty and Boyd were walking. Dougherty did not see David when he was shot; he did not see the person who did the shooting; he saw no gun flashes; he neither saw nor heard anything to indicate the presence of box car thieves prior to the firing of the

two shots. David was armed with a revolver and a sawed-off shotgun at the time.

Gladsen was subsequently convicted of the murder of David and sentenced to life imprisonment.

McCarthy did not give to Boult or to any other officer or agent of appellant advance information of the contemplated robbery. He made no report of any kind with respect thereto until seven or eight o'clock in the morning following the occurrence in which David was killed. He then gave Boult "all the information on who killed David and how it happened." As a result of McCarthy's failure to inform Boult of the intended robbery neither the train riders, David and Boyd, nor the members of the train crew were given any warning thereof.

Appellant contends that McCarthy had no opportunity for communicating with Boult over the telephone prior to the happening of the event without uncovering himself as an informer. The evidence, however, abundantly justifies a finding to the contrary. It shows that for reasons of his own McCarthy absented himself from the members of the gang for a brief interval two or three time during the evening prior to the departure for Leavenworth. It further shows that there were many other occasions during the same period when, on one pretext or another, he could have left them for a sufficient length of time to have gotten into communication with Boult's office—unless he was under suspicion, and that is not remotely suggested by the record.

McCarthy's employment was kept a secret; only the heads of the special service department were supposed to know it. Presumably David had at no time any knowledge of the company's efforts to secure advance information of intended robberies.

The cause was submitted to the jury on the following assignment of negligence: "that said defendant through its agents and employees knew of said contemplated robbery in time, by the exercise of ordinary care, * * * to have warned said James Lee David of said proposed robbery so that said James Lee David could have protected himself, but said defendant negligently and carelessly failed so to do, and as a result thereof said James Lee David was shot and killed as aforesaid."

I.

It is contended by appellant that, even though it had advance information that a gang of armed thieves and robbers were intending to loot one of its trains at South Leavenworth in the early morning of May 17, and, therefore, knew the specific perils that would be encountered at said time and place by its train rider, David, it was under no duty to impart such information to him, and for that reason it was not negligent in failing to do so. The contention is stated at length by counsel as follows:

> "The deceased, James Lee David, having been employed by the defendant for the express purpose of protecting defendant's trains from car thieves and train robbers, and having been fully warned that robberies of such trains as he was

guarding and riding were likely to occur at any time and place and that the car thieves were desperate characters who were likely to take his life in attempts to frustrate such robberies and in the protection of said property by him, and having been fully instructed to arm himself, as he did arm himself, with a loaded revolver and loaded sawed-off shotgun; and said David having accepted employment with knowledge of such probable activities of said train robbers and of the dangers to himself in coping with them, he voluntarily assumed the risks of such employment, and the shooting of David by Gladsen was incident to David's service and was one of the risks assumed by him. This was one of the risks and perils ordinarily incident to this employment. * * * No duty, therefore, rested on his employer to obtain and give David notice of this particular intended train robbery."

The facts of this case, as the basis of an action for personal injury or death, are unusual. The question of whether they constitute a sufficient predicate for the charge of negligence may, nevertheless, be resolved upon principles which are familiar. Assumption of risk arises out of the contract of employment, the obligations of which are mutual. The servant on the one hand impliedly agrees to assume the risk of all dangers and perils ordinarily incident to the work undertaken by him; the master on the other hand impliedly contracts that he will at all times do whatever may be needful to minimize or obviate such risks, in so far as the same may be done by the exercise of ordinary care. It is axiomatic that, *prima facie*, a servant does not assume any risks which may be obviated by the

exercise of reasonable care on the master's part [3 Labatt's Master & Servant (2d Ed.), §894].

> "One, and perhaps the most important, of those exceptions (to the doctrine of assumption of risk), arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require * * *" [*Hough* v. *Railroad*, 100 U. S. 213, 217].
>
> "It is those risks alone which can not be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes" [*Pantzar* v. *Mining Co.*, 99 N. Y. 368, 376; see also Labatt, *supra*, §1178 and cases cited in the notes].

Although David knew, appreciated and assumed the dangers incident to his employment, it was, notwithstanding, the continuing duty of his employer to exercise ordinary care to minimize or obviate them. That a timely warning to David, giving him the information which appellant had acquired in advance of the intended robbery, subsequently attempted, would have greatly minimized, if not obviated, its perils to him, is so obvious as to require no elaboration. In its failure to give such warning, appellant was derelict in the discharge of a duty both moral and legal.

If the jury's finding in this case is warranted by the evidence, appellant's negligence, and not the as-

sumed risks incident to his employment, was juridically speaking the proximate cause of David's death.

II.

Appellant's next contention is that, even though its failure to warn David be deemed negligence, the evidence was not sufficient to justify a finding that such negligence proximately caused his death. This causal connection, it is true, must be proved by the evidence, as a fact, and not be left to mere speculation and conjecture. The rule, however, does not require that there must be direct proof of the fact itself. This would often be impossible. It is sufficient if the facts proved are of such a nature, and are so connected and related to each other, that the conclusion therefrom may be fairly inferred [*Settle* v. *Railroad*, 127 Mo. 336, 341, 30 S. W. 125].

The evidence is lacking somewhat in detail as to the shooting of David. Only two persons, perhaps, could have circumstantially described the occurrence; McCarthy, whose whereabouts at the time of the trial were apparently unknown, and Gladsen, who was serving a life sentence for the murder in the Kansas penitentiary at Lansing. The latter's deposition was taken and read in evidence, but he was not interrogated as to the fatal shooting. Notwithstanding, there are sufficient facts in evidence to induce the belief that David unsuspectingly walked into a veritable death trap.

When the train came to a stop in the yards at South Leavenworth, David presumably left the cab

of the engine where he had been riding and started walking toward the rear of the train, examining the seals on the box cars as he went. The flashlight which he carried was not necessary for that purpose and was not used by him. When he had gotten a distance of twenty or twenty-five car lengths from the engine, two shots, fired in close succession, suddenly rang out, and he fell to the ground alongside the train, dying instantly. Dougherty, the conductor, who had left the caboose and was walking forward on the same side of the train, neither saw nor heard anything that attracted his attention until the two shots were fired; at that time he was but four or five car lengths from where David fell; he did not see David when he was shot; he did not see anyone do the shooting; he saw no flash from the firearm; and he saw no one running away from the scene of the shooting. Manifestly, the assassin was hiding between the cars, he fired at David the moment he came in range and then made his escape from the opposite side of the train. Whether Gladsen, who was there for the purpose of breaking into the box cars and stealing the contents, was impelled by fear of detection to shoot David, or otherwise, is a matter of conjecture. Notwithstanding, the outward setting is perfectly plain; David unwittingly walked into deadly peril and thereby lost his life.

Appellant argues that as David had been warned specifically and fully with regard to the activities of the gang of thieves, of their dangerous character and of the likelihood of their attempting to shoot and kill

him in case he came in contact with them, it can not be reasonably inferred that he would have been any more alert or would have taken any greater precaution for his own safety, on the occasion of the attempted robbery at Leavenworth, had he been forewarned with respect to it. The argument overlooks the fact that the dangers generally incident to David's work, like those of any policeman who walks a beat at night, were merely contingent and in a sense remote. Foreknowledge that a specific danger will arise at a definite time and place will bring about quite a different reaction on the part of a policeman or any other. In addition to quickening the perception of the danger, such knowledge makes possible the adoption of adequate measures to meet or avoid it. From the characteristics of the thieves and their methods of operating, it is quite clear that they never courted an open battle with train guards; they merely shot their way out of trouble. If David had known of their presence when he left the engine cab, he would also have known that it was not only possible, but highly probable, that some of them were lurking between the box cars. With that knowledge it is inconceivable that he would have exposed himself to the particular peril which cost him his life. To say that he might have been killed anyway, even if he had been forwarned that the thieves would be there and had consequently followed a different course for the purpose of warding them off and protecting the company's property, is to leave the evidence for an excursion into the field of conjecture. From the evidence it

may be justly inferred that David's death resulted from appellant's failure to warn.

What has been said disposes of all the questions raised and presented for determination. The judgment of the Circuit Court is affirmed. All concur.

WILLIAM T. RAGLAND, J.

[fols. 233-238] Motion for rehearing, covering five pages, filed July 2, 1931, omitted from this print. It was denied and nothing more by order of July 28, 1931.

[fol. 244] Motion to transfer cause to Court *in banc* covering one page, filed July 2, 1931, omitted from this print. It was denied and nothing more by order of July 28, 1931.

[fol. 246] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SEP 8
CHARLES E...

No. 365

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, AND BRIEF IN SUPPORT THEREOF.

EDWARD J. WHITE,
of St. Louis, Mo.,
THOMAS HACKNEY and
LESLIE A. WELCH,
of Kansas City, Mo.,
Counsel for Petitioner.

INDEX

Petition—

Questions Presented 2

Nature of Action 5

Summary of Evidence 8

Witness R. S. Mitchell 9

W. H. Boullt 9

Chas. A. Gladson 12

Lawrence F. Hayes 14

Ada Riley 17

Sophia David 17

L. Q. Moore 18

H. M. Dougherty 19

C. M. Barber 20

Reasons for Allowance of Writ 23

Brief—

I. This court has jurisdiction 25

II. David assumed risk of fatal injury 26

III. David was not entitled to special warning 31

IV. David had no knowledge of McCarthy's employment; had no promise of advance information. Petitioner not responsible for McCarthy's failure to give notice 31

V. McCarthy was not the agent of petitioner. He was at most an independent contractor 32

VI. McCarthy was the sole judge of whether he could safely give advance information of intended robbery 33

VII. Failure of proof that lack of special warning was proximate cause of fatal injury 34

VIII. Verdict of jury result of conjecture and speculation 34

CASES CITED.

Ashton vs. B. & M. R. Co., 222 Mass. 65 26
Atlantic C. L. R. Co. vs. Southwell, 271 U. S. 64 31
Boldt vs. P. R. Co., 245 U. S. 441 ..... 23, 26
Chicago M. & St. P. R. Co. vs. Coogan, 271 U. S. 472 ..... 5, 25
Chicago G. W. R. Co. vs. Crotty, 141 Fed. 913 26
Cudahy Pkg. Co. vs. Marcan, 106 Fed. 645 ..... 26, 27
Feaster vs. Southern R. Co., 15 Fed. (2d) 540 ..... 31, 34
Hough vs. T. & P. R. Co., 100 U. S. 213 28
King vs. Morgan, 109 Fed. 446 26
Kohn vs. McNulta, 147 U. S. 238 26
Lowrey vs. Atlanta Jt. Term, 145 Ga. 782 ..... 31, 34
Manwell vs. Dourst, 178 Calif. 752 31
Meyers vs. W. C. DePauw Co., 138 Ind. 590 ..... 26, 28
Morey vs. Maine Cent. R. Co., 126 Me. 272 ..... 26, 27
Pryor vs. Williams, 254 U. S. 43 23
Seaboard A. L. Co. vs. Horton, 233 U. S. 492 26
Southern Pac. Co. vs. Seley, 152 U. S. 145 26
St. L.-S. F. R. Co. vs. Mills, 271 U. S. 344 ..... 5, 24, 25, 31, 32, 34
Sweeney vs. Berlin & Jones Env. Co., 101 N. Y. 520 29
Toledo St. L. & W. R. Co. vs. Allen, 276 U. S. 165 ..... 23, 26, 27

TEXT BOOKS CITED.

2 Corpus Juris, 424 Sec. 10 33
30 Corpus Juris, p. 502 31
3 LaBatt M. & S. (2d Ed.) Sec. 1113 31
3 Words & Phrases, 3rd Ser., p. 206, title "Employee" 33
4 Words & Phrases, 3rd Ser., pp. 222-229, title "Independent Contractor" 33

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Missouri Pacific Railroad Company, a corporation, respectfully petitions this Honorable Court to grant its Writ of Certiorari to the Supreme Court of the State of Missouri, and to remove therefrom to this court for review the record in the cause there lately pending entitled *Sophia David, Ad-*

ministratrix of the Estate of James Lee David, Deceased, Respondent v. *Missouri Pacific Railroad Company, Appellant,* being No. 29,330 on the docket of that court, the petitioner herein being the appellant therein.

The judgment of the Supreme Court of Missouri rendered on June 24, 1931 (R. 219), which affirmed the judgment of the trial court, became final on the denial of appellant's motion for rehearing and motion to transfer to court *en banc* on July 28, 1931 (R. 234).

A duly certified copy of the entire record of said cause is herewith presented.

QUESTIONS PRESENTED.

The questions involved in this petition for certiorari are these:

1. Whether in an action under the Federal Employers Liability Act against petitioner, an interstate carrier, brought by the legal representatives of a deceased employee, David, an armed train rider who was shot and killed by a train robber while the deceased and another train rider were protecting an interstate train from theft of merchandise thereon, the petitioner was liable for the death of the said deceased on account of not having warned him of that particular intended train robbery. Or, whether the risk of such injury had been assumed by the deceased, an experienced train rider and guard who had been warned of the activities and dangerous character of a gang of train robbers on petitioner's trains, and of the likelihood that train robberies would occur at any time and place, and had been instructed to keep constantly on the alert and

to shoot to kill if necessary to protect himself from injury, and had been furnished a loaded automatic revolver and a sawed-off shot gun, loaded with buckshot and had agreed at the time of his employment to cope with such train robbers and was thus armed at the time of his fatal injury.

2. Whether the applicable law of assumed risk was correctly declared by the Missouri Supreme Court in its opinion (R. 230) thus:

> "Although David knew, appreciated and assumed the dangers incident to his employment, it was notwithstanding the continuing duty of his employer to exercise ordinary care to minimize or obviate them."

3. Whether one McCarthy, a known member of an active gang of train robbers and car thieves who, for an agreed compensation, to be paid him by petitioner, secretly agreed to furnish petitioner's Assistant Special Agent Boullt with such advance information as he, McCarthy, by continuing to consort with them, might obtain of this gang's intended robberies of trains of petitioner whenever he could do so with safety and without uncovering himself to his gang—he, McCarthy, to employ his own means, methods and time in obtaining and using this information, all without control of petitioner—was an independent contractor for whose acts or omissions petitioner was not liable. Or whether said McCarthy thereby became the agent or servant of petitioner, so that his uncommunicated knowledge of an intended train robbery was imputed to petitioner and a duty thereby cast upon petitioner of

warning David of the particular time and place when this intended train robbery would occur.

4. Whether said McCarthy, if deemed the agent or servant of petitioner, was the sole judge of whether he could or could not with safety and without uncovering himself, telephone petitioner's special agent, Boullt, and advise him of this intended robbery. If not, then whether the evidence was sufficient to prove that McCarthy was negligent in not so advising said Boullt.

5. Whether the secret efforts of petitioner to obtain from McCarthy advance information of intended train robberies, all done without David's knowledge, and without promise to furnish him such information, rendered the furnishing of such information to David a duty on petitioner's part.

6. Whether, if petitioner was charged with the knowledge which McCarthy had of the intended train robbery, though uncommunicated to petitioner, the failure of petitioner to warn David of the time and place the particular, intended robbery was to be attempted, was, under the evidence, the proximate cause of his death.

7. Whether the evidence was sufficient to show any negligence on the part of petitioner in discharging the duty which it owed to David.

The petitioner claims that the evidence is not sufficient to support the finding of negligence on its part, and that the verdict of the jury and the judgment below are based on erroneous theories of liability and are the result of speculation and conjecture.

The Supreme Court of Missouri, in its opinion (R. 219-234) not yet reported, held that the evidence was sufficient to establish the negligence of petitioner, and that such negligence was the proximate cause of David's death.

The question as to the sufficiency of the evidence to support the verdict and judgment in question, the action being based on the Federal Employer's Liability Act (U. S. C., Tit. 45, Sec. 51), where both the carrier and its employe, at the time of the fatal injury, were concededly engaged in interstate commerce, is therefore clearly a federal question and within the jurisdiction of this court on certiorari.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Coogan*, 271 U. S. 472, 474 and cases cited.
St. L.-S. F. Ry. Co. v. *Mills*, 271 U. S., 344, 346.

NATURE OF ACTION.

This is an action brought under the Federal Employer's Liability Act (U. S. C. Tit. 45, Sec. 51), for damages on account of the fatal shooting, by a train robber, of James Lee David, a train rider for the petitioner, while the deceased was protecting and guarding an interstate train at Leavenworth, Kansas, on May 17, 1923. The respondent is his widow and the administratrix of his estate.

The suit was instituted and tried in the Circuit Court of Jackson County, Missouri. On the trial before a jury respondent recovered a verdict and judgment for $15,000.00 (R. 1.), whereupon, after unsuccessful motions for new trial and in arrest of judg-

ment, petitioner duly appealed to the Supreme Court of Missouri (R. 2), where the judgment was affirmed (R. 219).

The amended petition on which the case was tried (R. 4) after formal averments as to the employment of David in interstate commerce, his death and the appointment of the administratrix, averred (R. 5) that David was a train rider, "whose duty it was to ride upon the trains of the defendant for the purpose of protecting its property and the property carried by it from damage and loss, and in general to watch over and guard the trains and property carried upon the trains of defendant, while in transit." It further averred (R. 5) that the defendant prior to said date had employed "a certain person as an *informant* who was known by defendant at said time to be an ex-convict, a thief and robber who *consorted* with thieves, robbers, murderers and other desperate persons and that the defendant instructed said informant *to continue to consort* with thieves, robbers, murderers and persons of desperate character and to learn of their plans and designs especially with reference to theft or robbery of property of the defendant, or in its possession, and further instructed said informant that whenever he should learn of any proposed robbery or theft of or from the defendant, that said informant should report such fact to the defendant, to the *end* that such thieves or robbers might be *interrupted and apprehended.*"

It further averred (R. 6) "that said informant entered upon said employment and was regularly paid by

the defendant therefor; that at some time prior to the 17th day of May, 1923, the said informant, then in the employ of defendant, * * * consorted with certain desperate persons known to said informant to be thieves, robbers and murderers and said persons informed said *informant* that they intended to rob a certain train of the defendant at Leavenworth, Kansas, in the early morning of said May 17, 1923; that said informant, the *agent* of defendant, accompanied the thieves and robbers to said Leavenworth, Kansas, well knowing the designs and intent of said persons, and knowing that they were armed with firearms and knowing that they were of such desperate character that they would take human life in order to accomplish their purpose or to protect themselves if interfered with, and knowing that train riders and train crew on said train would be subjected to the hazard of an encounter with said desperate persons, and said informant went with said persons and remained until the arrival of said certain train of defendant, and upon the arrival of said train said persons, in the presence of said informant, surrounded said train with the intent to rob the same."

The amended petition further averred that said David was riding said train as a train rider on the morning of said contemplated robbery (R. 6-7) "without any knowledge or warning of said contemplated robbery."

It further averred (R. 7) "that said thieves and robbers while attempting to carry out their designs to rob said train, saw said David upon said train and did then and there with a firearm shoot and kill said David in the early morning of said May 17, 1923."

It further averred (R. 7) "that said defendant, through its agents and employees, knew of said contemplated robbery in time, by the exercise of ordinary care, to have frustrated and prevented the same, and to have afforded protection to said James Lee David, and to have warned said James Lee David of said proposed robbery so that the said James Lee David could have protected himself, but said defendant negligently and carelessly failed so to do and as result thereof said James Lee David was shot and killed."

The Answer (R. 8) consisted of a general denial and a plea of assumption of risk by the deceased.

SUMMARY OF THE EVIDENCE.

In order to show the employment of McCarthy as an informant and what the petitioner expected to obtain from him thereby, the plaintiff on the trial below introduced in evidence the depositions of R. S. Mitchell, Chief Special Agent of the petitioner (R. 11), and W. H. Boullt, Assistant Chief Special Agent (R. 33). In Mr. Mitchell's deposition (R. 16-18) the reasons for employing McCarthy, the situation confronting the railroad at the time, and the nature of McCarthy's employment, are given fully. In brief, Mr. Mitchell's testimony showed that the Missouri Pacific was at the time being harassed and robbed by an organized gang of thieves in and adjacent to Kansas City; that he learned that McCarthy was a member of this gang, and would, for a consideration, be an informant against this gang. He testified (R. 17):

"I arranged with him to keep us informed as to the activities of this gang, to give us advance information if possible, when this gang planned to rob our trains, and further arranged with him in the event he could not get to us, couldn't give us advance information, to give us information then as to the 'fence', where the stuff was taken, as well as who was in the robbery, and all the details possible."

He testified further that he introduced McCarthy to Boullt and arranged with McCarthy to report to Boullt and to make his reports by telephone; that the matter was then turned over by him, Mitchell, to Boullt, and to no one else, for handling with McCarthy. He further testified (R. 29) that his sole purpose in employing McCarthy was to get information of the activities of this bunch of thieves who had been robbing box cars; that he did not authorize McCarthy to carry a gun nor do any act of apprehending any person or do any criminal act; that McCarthy was simply to get information; that he was not to stage any robberies, but was simply to continue trailing with these thieves. That after the killing of David, McCarthy assisted in convicting Gladson, who is now serving a life sentence for shooting David.

The testimony of Mr. Boullt with respect to the employment of McCarthy, the reasons therefor, and the activities expected of him, was in line with the testimony of Mr. Mitchell.

Testifying as to McCarthy's instructions (R. 41) he said:

"Well, we couldn't very well give him *instructions*. He was a man to furnish us with *in-*

formation where these robberies were committed, who was committing them, and, if he could get to us in time, to tell us before the robbery was committed; if not, to tell us what had become of the goods.

"Q. Well, what was the plan and arrangement with respect to whether or not he was to go with this gang on their robbing expeditions?

A. He was to continue the same as he had, to get information; that is generally *up to the man's own idea,* that is working. * * * His instructions were that he was to get us word before the robbery was committed if he could; if not, to give us information as soon as he could after the robbery had been committed. He was to report this information to myself. I advised him to reach me through the telephone."

Further on he testified (R. 42):

"Q. Now, you say if it was 'possible' McCarthy was to give you this information in advance of the robbery?

A. If he could, yes, sir.

Q. By 'possible' do you mean if he could do that without letting the gang know he was giving the information?

A. Why, *he would have to use his own judgment about that.* You see *we could not tell him how to use this information.* * * *

Q. But I understand he was to notify you if he could without tipping off the gang that he was giving notice?

A. That is right."

This witness further testified (R. 43):

"Q. As to his *ways* and *means* and *methods* of securing this information for you with respect to who this gang was when they were robbing you, and if they had robbed you, what became of the

goods, *you left that largely to the discretion of McCarthy.*

A. Yes, to furnish us the information."

The witness then detailed numerous reports of intended robberies made by McCarthy to him, and testified that on preparing to meet the intended robberies, the thieves failed to appear. Asked with regard to the attempted robbery at Leavenworth, in which David was killed, witness said that he first learned of it by getting a telephone call the morning after David was killed. Asked if McCarthy had made any report of this intended robbery prior to its occurrence, he said he had not (R. 49).

He further testified (R. 52) that the first report he had from McCarthy was about seven o'clock the next morning. The witness was in Leavenworth, Kansas, when he received this information by phone; that later he had a talk with McCarthy; that McCarthy gave him all the information on who killed David, how it happened, and accompanied Boullt to Leavenworth and made a report to the county attorney; he also gave information as to the names of the persons in the gang and how they went to the scene of the shooting.

Those parts of the deposition showing McCarthy's report to Boullt as to when this particular robbery was arranged, and of his ineffectual efforts to telephone to Boullt, appearing on pp. 53 and 54 of the record, were withdrawn by the plaintiff, but were offered by the defendant (R. 60) and excluded by the court.

Mr. Boullt further testified (R. 56) that McCarthy was to report to no one but him, Boullt. He further testified (R. 57):

"Q. As I understand you, McCarthy was not to report an intended robbery to you unless he could do it without letting the gang know that he was so reporting?
A. Not uncovering himself. Not so he would uncover himself.
Q. So they would not get on?
A. Yes.
Q. Was McCarthy instructed to instigate any robberies in order to lead the gang into a trap?
A. No, sir."

The plaintiff introduced in evidence the deposition of Albert Charles Gladson (R. 61-68) taken at the Lansing, Kansas, State Penitentiary. On the question of planning this robbery Gladson testified that the gang, including McCarthy, were on the 16th of May hanging around the Court House in Kansas City, Kansas, listening as spectators to the trial of one Hogie Ward, who was then being tried for the payroll holdup of Wilson & Co. (R. 62). That along about noon of that day he had some talk with McCarthy about robbing the Missouri Pacific box cars at Leavenworth that night (R. 63). Asked whether any plan or arrangement was made at noon to commit this robbery, he answered (R. 63):

"Why, all the boys what belonged to the gang was supposed to go down to Riley's house right after the trial, meet down there.
Q. And then what was to be done?
A. Then they was going to make arrangements, try to get two cars to go up, some of the boys didn't want to come up."

He further testified (R. 66) in substance that the gang left the court room about six o'clock in the eve-

ning and went to Riley's house; that there were two carloads of them. Asked further about their plan he testified (R. 67):

> "Why we consulted all of us down there, and some of them didn't want to go so we who did want to go—it was I and McCarthy and Lawrence Hayes and Charles Masterson, four of us started and made it up to go that night about six-thirty or something like that. * * * I had a date with a girl that night so I wanted to go up and see and put it off and Charles Masterson had to go to see the doctor so Lawrence Hayes and McCarthy and I and Masterson went up to Wyandotte and I got off at 10th and Central and Masterson went up to the doctor's office so I made a date with him to meet me as he was going back. * * *
>
> Q. To meet you where?
>
> A. At 10th and Central.
>
> Q. Where were they going?
>
> A. To the doctor's office, and then go down to see this freight go through (Kansas City, Kansas) *and see what was on it.*
>
> Q. Where did they say they were going to see the freight, to what street or crossing?
>
> A. It foots there at 3rd and Minnesota.
>
> Q. What was the purpose of going down to see the train as it went through?
>
> A. Why mostly to see if there was *any good merchandise* on it."

Gladson further testified (R. 58) that he met McCarthy and Lawrence Hayes at 10th and Minnesota at nine o'clock that night; that they wanted another man and went down and got Red Loar, who was then in bed and the lights were all out in the house; that they went from there to Gladson's home and then drove to Leavenworth, arriving about 12:30 that night and waited

for the freight train to arrive. He testified further (R. 69):

> "Q. Well, when the train came in what was done if anything toward carrying out your plan and purpose of robbing the train?
> A. Why, McCarthy and I and Red Loar got out of a car and McCarthy and I went over to the railroad track and hopped on the train and went on down in the yards. The train stopped down there."

No further details of what occurred at the time of the fatal shooting of David, nor how nor where the witness shot David, were called for or developed by plaintiff's counsel in this deposition of Gladson, although Gladson was then in the Lansing State Penitentiary serving a life sentence under a conviction of murdering David.

As a part of Gladson's cross-examination a transcript of his previous testimony in the trial of one of the criminal cases was attached to the deposition and was received in evidence on the trial.

On pages 96 and 97 of the record will be found a description by Gladson of the tragedy when David was shot, especially the talk between Gladson and David, just before the shooting. It appears from this testimony that David threw a flashlight on Gladson and commanded him to come over on that side of the train and that Gladson refused and the fatal shots followed.

Plaintiff read in evidence the deposition of Lawrence Hayes taken at the State Penitentiary at Lansing, Kansas. This deposition (R. 117-167) consists in the main of an account of the activities of his gang. Being asked about any conversation with McCarthy

during the day of May 16th, about robbing any particular train, he answered (R. 120): "Well, not exactly."

Asked further about any plan to rob this particular train that night, he said (R. 120):

> "A. There was no plan or anything made, just—we didn't have no set plans to rob cars that we figured on ahead, just what we were to do."

The witness then testified, giving some of the details of the gang's meeting at Riley's. He testified further that later in the evening, about 8 o'clock, he and Masterson and McCarthy drove to the doctor's office where Masterson got out and went in the building to see the doctor; that McCarthy got out of the car also, and said he was going into the drug store; that he stayed in the car when Masterson went to see the doctor; that when Masterson came back he and Masterson sat in his car a while *just across from the drug store* and then went into the drug store; that McCarthy was in there; that he had *seen McCarthy go into the drug store* (R. 123) but while he did so he, Hayes, stopped *in front of the drug store.* Asked what McCarthy was doing in the drug store when he and Masterson went in, witness said (R. 124):

> "Why, I do not know; I guess he was looking around—just—I don't even know what he went there for, I guess he wanted a drink or something but he was not drinking when we got there, he joined us in a drink."

Witness testified that afterwards they went from the drug store and picked up Gladson; that Masterson

did not accompany them; that they went to the foot of Minnesota Avenue where a freight train was pulling in and they got out of the car and watched the freight train go by; that after picking up Gladson and Loar they went by the home of McCarthy; that McCarthy went onto the front porch and got a pair of overalls and a jumper he had there (R. 126) and while he did so the witness and others stopped in the street *where they could see McCarthy all the time* (R. 127).

Hayes further testified on cross-examination (R. 152-153) that he participated in the train robbery at Nearman, Kansas, between Kansas City and Leavenworth, of this same train about a month before David was killed, in which robbery Masterson was shot; that the "bulls" (train riders) did the shooting; that Gladson and Masterson were armed; that McCarthy was not with them that night. He further testified (R. 139) that on the night of May 2nd, about two weeks before David was killed, he, Hayes, participated in a robbery of the same train at Woolcott (between Kansas City and Leavenworth); that Bert Gladson, Red Loar, George Riley, Hobart Ward, Freddie Thompson, John Rock, Sonny Davis, George Oftener and himself participated in that robbery; that they had two automobiles and robbed most of the whole train; that they held up the brakeman and made him stand still at the road crossing while they robbed the train; that they loaded the stuff into the trucks and got away.

Testifying further as to the arrangement to rob the particular train that David was guarding when killed, the witness said (R. 154):

"Q. The talk you had with McCarthy when you started out was that you were going to rob some box cars, you didn't know just what box cars you were going to rob?

A. He suggested the Missouri Pacific himself.

Q. He suggested that to you but you had not made any plan to rob *any particular train* until you started from Riley's house?

A. *Until we went down to the foot of Minnesota Avenue we didn't know we were going to rob that train then.*"

The only other witness introduced by plaintiff who testified to anything in relation to the arrangement for the robbing of the train in question was Mrs. Ada A. Riley, the widow of George Riley, the latter being the reputed head of this gang of thieves. She testified in substance (R. 171) that on the evening preceding the killing, Gladson, Hayes and McCarthy were at their home and something was said about their going up to Leavenworth, and that she heard her husband, George, say "I wouldn't go up there tonight for fifty dollars; you have made that place too hot—it's hot—I wouldn't go up there for fifty dollars," so George didn't go and Freddie wouldn't go; that McCarthy asked Freddie for a gun, which was refused. Thereupon McCarthy, Gladson and Hayes went into the back yard.

Sophia David, the widow, testified (R. 172-176) that her husband worked for a coal company during a strike in Kentucky several years previously, his work being that of looking after the place for others, where they had a machine gun with a headlight on top of the building; that from 1911 to 1915 her husband was employed by the Pinkerton Detective Agency as a guard

walking a beat for them in Kansas City, and that he was armed at the time of such service; that during the time he was working for the Missouri Pacific he had in his possession and carried a revolver and a sawed-off shot gun.

There was no other evidence introduced by the plaintiff tending to show the circumstances immediately attending the killing of David, nor what opportunity McCarthy had, if any, to telephone word of the intended robbery to Mr. Boullt.

At the close of plaintiff's evidence defendant interposed a demurrer thereto, which was overruled (R. 178).

The defendant introduced as a witness, L. Q. Moore, who testified that he was a special agent for the Missouri Pacific (R. 178 *et seq.*) and to his having become acquainted with David in Kentucky where David worked for him a few months in 1907 or 1908 during the coal strike, during which time David was armed and on one occasion David had kept another man from shooting him, Moore; that he next saw David on December 18, 1922, and talked with him regarding a job on the Missouri Pacific. David wanted a job as special agent or train rider if such a job was open; that arrangements were then made for David to meet Mr. Barber, another official of the Missouri Pacific, whereupon he took him to Barber with a view of such employment, and conversation was had between Barber and David regarding his duties and the nature of the position; that Barber told David there was a lot of thieves on the road and he had a position open as a train rider; that they were having a lot of train rob-

beries and said that there was a position open. He further said, "I want to know whether you will fight these fellows or not," to which David replied, "*I will fight them until I die.*" That thereupon arrangements were made for David to start work; that David was provided with a .45 automatic Colt revolver and a sawed-off No. 12 shot gun, loaded with No. 1 buckshot; that David and one Boyd were assigned to riding trains between Kansas City and Leavenworth; that witness told David to be careful and look out for these fellows, and also gave him all the pointers he could.

> "Q. State what you said about the danger if any of dealing with these men.
> A. I told him they would shoot him just as quick as they saw him and to be careful—'be careful and watch your step,' is about what I said to him."

This witness further testified (R. 184) that during the time of David's employment in this work, until the witness left Kansas City, he saw David every morning when he came in; that he had the sawed-off shotgun and revolver at all times.

H. M. Dougherty testified (R. 186) that he was conductor in charge of the train David was riding at the time of the fatal shooting; that he saw David on the train that night previous to getting to Leavenworth; that David boarded the train at the A-C Junction, being armed with a sawed-off shotgun and a revolver and rode the caboose that night to Woolcoltt; that when the train stopped at Woolcott, David went on up through the train and stayed up on the head end of the train from Woolcott; that one of the train riders

rode one end of the train and the other, the other; that the next stop after Woolcott was South Leavenworth; that on reaching South Leavenworth, his train took the passage heading of the main line; that that was the meeting place of trains; that he had been on the passing track that night about ten minutes before he heard the shooting; that witness was walking between the passage track and main line train when the shooting began; Boyd, the other train rider, was right behind him; that they were at that time about fifty cars from the caboose and about four or five car lengths from the place of the shooting; that when the shooting began Boyd then commenced shooting and witness then went up to where David was, about twenty-five cars ahead, and found David lying on the ground dead; that David had a sawed-off shotgun and revolver with him; that train riders usually carry a flashlight which they use in examining seals; that witness didn't see anybody do the shooting, and didn't see David when he was shot; that it appeared that David was shot from someone standing up and the shot ranged downward; he was shot probably in the breast somewhere (R. 191).

C. M. Barber, Assistant Chief Special Agent of the defendant, occupying the place Mr. Boullt occupied prior to his death, testified (R. 192-201) that he was formerly special agent for defendant, his general duties being to employ men to guard the company's property in the capacity of special agent.

The witness testified to the circumstances of his employment of David and the nature of the work he wanted done. He testified (R. 194): "I told him (David) that we were having a great deal of trouble

with a bad gang of train robbers robbing our trains en route, and that I was looking for a man of sufficient ability to cope with them—a man who was not afraid to cope with them and a man who would shoot and use good judgment and watch things, and if necessary to possibly kill them, and after I had gone over the matter thoroughly with him, he said 'I will take the job,' or words to that effect. * * * I explained to him that they had been robbing the trains en route, throwing the stuff out en route, and they were a large gang and a bad gang, that they were armed, all of them, and that all of them would shoot him on sight and that he had to be very careful about his own life."

He testified further (R. 195) that David was carrying a pistol and a sawed-off shotgun; that they were given him for the purpose of defending himself and the company's property * * * "there was a general instruction out to all our men to carry their arms anywhere they go, anywhere so they could get hold of them, because they were told they would be liable to need them at any time."

The witness then (R. 195-196) detailed the circumstances of the train robbery at Woolcott about two weeks previous to David's shooting; that that was on the train David was to have ridden that night but which train David had left chasing some thieves in the Kansas City yards and the train pulled out and left him; he further testified that David was fully advised as to what occurred up at Woolcott that night, along with the other man; that Boyd usually rode this train with David; Boyd was armed with a pistol; he was not sure whether he carried a shotgun; that all train riders

were supposed to carry flashlights with which not only to examine seals but to protect the train rider from hiding bandits between the cars. Asked if there had been any other attempts to rob the train other than this Woolcott robbery up to that time, the witness answered "Many, many." He further testified (R. 198) that prior to the killing of David, two of the Kansas City, Kansas, thieves, Loar and Gladson, had been tried and convicted of an Osawatomie, Kansas, robbery and were then out on bond.

The witness further testified (R. 199) that he did not advise other special agents, or train riders or anyone of the employment of McCarthy; that this employment was kept a secret; that it was not calculated to come to the knowledge of any of the company's employees outside of the heads who employed him. Witness further testified that he had no knowledge of the purpose of Gladson and others to rob this train before David was killed; that he first learned of the killing early the next morning. He further testified on cross examination (R. 200) that he had never known McCarthy prior to the time David was killed nor come in contact with him at any time; that he had nothing to do with the employment of McCarthy.

At the conclusion of all the evidence the petitioner again asked a peremptory instruction directing a verdict for the petitioner, which was refused by the court.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Supreme Court of Missouri, in an action under the Federal Employers Liability Act, has again failed to follow the rule of this court as to assumption of risk, by a servant, announced in its numerous decisions such as:

Pryor v. *Williams*, 254 U. S. 43, 45, 46.
Toledo St. L. & W. R. Co. v. *Allen*, 276 U. S. 165, 168, 169.
Boldt v. *Penna. R. Co.*, 245 U. S. 441, 445.

It has again applied, in effect, the so-called "Missouri" rule which virtually eliminates assumption of risk as a defense, leaving the master in such cases to the defense of contributory negligence only, holding that the servant's knowledge of the risk is not conclusive against him.

2. The decision of that court to the effect that the arrangement with McCarthy, by which petitioner sought to obtain from him information as to the activities of the gang of thieves of which McCarthy was a member, constituted McCarthy an agent of the petitioner, so as to impute to the petitioner the knowledge of the intended activities of his gang, though uncommunicated by him to petitioner, is in conflict with the well settled rules of the common law as enunciated by the federal courts and state courts generally.

3. The decision of that court to the effect that the ineffectual attempt of the petitioner to

obtain advance information of intended robberies through McCarthy threw upon petitioner the duty of giving David advance information of the intended robbery in question, is in conflict with the decision of this court in *St. L. & S. F. R. Co.* v. *Mills,* 271 U. S. 344.

4. The Supreme Court of Missouri, whose decision is sought to be reviewed herein, is the highest court in such state in which a review of this action could be had.

BRIEF IN SUPPORT OF PETITION.

I.

This Court Has Jurisdiction.

The respondent brought this suit under the Federal Employers Liability Act (U. S. C. Title 45, Sec. 51), to recover damages for injuries growing out of the death of her husband, an employe of petitioner, while both were engaged in the work of interstate commerce.

The trial court and the State Supreme Court held that the evidence was sufficient to show that petitioner was liable under the Act and sustained an award of damages to respondent therefor.

The rights and obligations of the petitioner depend on that Act and the applicable principles of the common law as interpreted by the federal courts.

The kind or amount of evidence required to establish liability, and the rules applicable to such evidence, are not subject to control of the several states.

The rule is well settled that this court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain the finding that the carrier was negligent, and that this negligence was the proximate cause of the injury, the judgment against the carrier will be reversed on certiorari.

Chicago M. & St. P. R. Co. v. *Coogan*, 271 U. S., 472, 474 and cases cited.

St. L.-S. F. R. Co. v. *Mills*, 271 U. S. 344.

II.

Under the Evidence and the Applicable Law as Interpreted by the Federal Courts, David Assumed the Risk of His Fatal Injury and Petitioner Is Not Liable for His Death.

In his contract of employment, David assumed the risk of being shot by a train robber in protecting petitioner's trains from robbery. He was employed and fully armed for this express purpose. He was fully apprised of all the dangers attending his work. It is well settled in an unbroken line of decisions of this court and other federal courts, and of numerous state courts, that he assumed the risk of his fatal injury and that no recovery can be had against petitioner.

Boldt v. *Penna. R. Co.*, 245 U. S. 441, 445.

Toledo St. L. & W. R. Co. v. *Alben*, 276 U. S., 165, 168, 169.

Cudahy Pkg. Co. v. *Marcan*, (8th C. C. A.), 106 Fed., 645, 647.

King v. *Morgan*, (8 C. C. A..) 109 Fed., 446, 450.

Chi. G. W. Ry. Co. v. *Crotty*, (8th C. C. A.), 141 Fed., 913, 916.

So. Pac. Co. v. *Seley*, 152 U. S. 145.

Kohn v. *McNulta*, 147 U. S., 238.

Seaboard Air Line R. Co. v. *Horton*, 233 U. S. 492, 504.

Morey v. *Maine Central R. Co.*, 126 Me., 272; 133 Atl. 92.

Ashton v. *Boston & M. R. Co.*, 222 Mass., 65; 109 N. E. 820.

Meyers v. *W. C. DePauw Co.*, 138 Ind., 590; 38 N. E. 37.

A late expression of the rule by this court, which is in full harmony with the other cases cited, is found in *Toledo St. L. & W. R. Co.* v. *Allen, supra,* where this court said, *inter alia*:

> "And except as specified in Section 4 of the Act (45 U. S. C. A., Sec. 54), the employe assumes the ordinary risks of his employment, and when obvious, or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees" (citing authorities).

In *Cudahy Packing Co.* v. *Marcan, supra,* Judge Sanborn, in discussing the effect of an assumption of risk by the servant, said, at page 647 of the opinion:

> "By entering upon and continuing in the employment, he assumes these risks and dangers, and no negligence can be charged to the master and no liability can be fastened upon him because he fails to give notice or warning of, or to remove these common risks of the employment" (citing authorities).

In *Morey* v. *Maine Central R. Co., supra,* in discussing the assumption of risk by the servant, it is said:

> "Dangerous work must be performed; and work must be done in dangerous places, and when a workman makes a contract to do such work, or to work in a dangerous place, he contracts with reference to that danger and assumes the 'open and obvious risks incident to the work' or, as some times expressed, 'such dangers as are normally and necessarily incident to the occupation.' This is a contractual assumption of

risk. *Ashton* v. *B. & M. R. Co.*, 109 N. E. 820; 222 Mass. 65, 69; *Seaboard Air Line Co.* v. *Horton*, 233 U. S. 492. With reference to risks and dangers covered by the contract the employer owes the employee no duty and so cannot be held guilty of negligence."

In *Meyers* v. *W. C. DePauw Co., supra*, the Supreme Court of Indiana, said:

> "The fact that the service is a dangerous one adds nothing to the liability of the master for injuries resulting from the natural and ordinary incidents of the undertaking."

The proposition boldly asserted in the opinion below to the effect that though there was an *assumption of risk* by the servant, yet that there was a *continuing duty of the master* to *minimize or obviate* the *well known dangers*, finds no support in the decision of this court in *Hough* v. *T. & P. R. Co.*, 100 U. S. 213, a small excerpt from which is quoted (R. 230), in the opinion below.

The learned author of the opinion, in fairness to this court, should have quoted the remaining part of the sentence, so that the limited application of the quoted part might be seen.

His attention should also have been challenged by the latter part of that opinion, where Mr. Justice Harlan was careful to state the correct rule of assumed risk applicable to the facts in that case, thus (25 L. Ed. p. 617):

> "If the engineer after discovering or recognizing the defective condition of the cowcatcher, or pilot, had continued to use the engine, with-

> out giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery so far as such defect was found to have been the efficient cause of the death. *He would be held in that case to have himself risked the dangers which might result from the use of the engine in such defective condition*" (italics ours).

The case of *Pantzar* v. *Mining Co.*, 99 N. Y., 368, from which the learned author of the opinion below, made an excerpt of a single brief sentence is not an authority to support the conclusion drawn therefrom by the learned author in the opinion below. The New York Court of Appeals in that opinion was dealing with a situation where the *servant had no knowledge of the dangerous condition of his place of work.* The court on the concluding page of the opinion said:

> "The evidence tends to show that the plaintiff was ignorant of the dangerous condition of the rock and that his duties did not call him to any place from which it could be observed. He therefore * * * is not justly censurable for an omission to discover the impending danger himself in time to avoid it."

If any doubt could be thought to have been cast on the well settled doctrine of assumption of risk by the quoted excerpt from the Pantzar case, that doubt was quickly and fully dispelled by that court in *Sweeney* v. *Berlin & Jones Envelope Co.*, 101 N. Y., 520; 5 N. E., 358, where, denying a recovery to an injured servant because he had assumed the risk from which he received his injury, the court in a unanimous opinion said:

"It is plain that the danger, to the knowledge of the plaintiff, was inherent in the use of the machine and to the work itself. The peril did not grow out of extraneous causes or circumstances which could not be discovered by the use of ordinary precaution nor to a condition of things different from those existing at the beginning of the service. It was part of the plaintiff's engagement that the master's work should be performed in the usual course and way of business. The work which the servant was called upon to do at the time in question was not of a different character from that which he originally undertook. The machine upon which it was to be done was one then in use. No new duty or species of labor was imposed upon him, nor was he required to work a machine with which he was not familiar. He was simply called upon to do that for which he was engaged, the doing of which formed the consideration for his employment. To say that the master should be liable to the servant in such a case is to say that he should not have the benefit of the labor for which he contracted. Such is not the law. * * * Under such circumstances there is no ground for charging the defendant with negligence or throwing upon it a risk assumed by the plaintiff when he took employment."

Applying therefore the applicable law of assumed risk to this case, it certainly must be held that after employing David and arming him for the express purpose of protecting its trains from train robbers, under an agreement that he would so protect said trains, petitioner was under no duty to employ some other person to obtain advance information of intended robberies and to frustrate the same, so as to keep train robbers from coming into contact with

David, nor under any duty to give him advance information of the time and place such robberies were intended to occur.

III.

David Was Not Entitled to Special Warning.

The inherent nature of David's work was sufficient warning to him of the danger which caused his death. No duty, therefor, rested, on his employer to obtain and give to David notice of this particular intended train robbery.

3 Labatt, Master and Servant, 2d Ed. Sec. 1113, p. 2939, *id.* p. 2948.

Lowrey v. *Atlanta Joint Terminals*, 145 Ga. 782; 89 Southeastern, 832.

30 C. J. p. 502.

Atlantic Coast Line v. *Southwell*, 271 U. S. 654; 48 Sup. Ct. 25.

Manwell v. *Dourst*, 178 California, 752; 174 Pacific, 881.

1 A. L. R. 669.

Feaster v. *Southern Ry. Co.*, 15 Fed. 2d. 540.

St. L.-S. Ry. Co. v. *Mills*, 271 U. S. 344; 46 Sup. Ct. 520.

IV.

David Had No Knowledge of the Employment of McCarthy As An Informant and Petitioner Had Never Undertaken or Held Out to David That It Would Furnish Him Advance Information of Any Particular Robbery.

The mere fact that petitioner had voluntarily undertaken to do more in anticipating robberies than it was obliged to do, did not make the furnishing of

such information to David a duty on petitioner's part. Therefore, regardless of whether McCarthy was the agent or servant of petitioner, or was an independent contractor, petitioner was not legally responsible to David for the failure of McCarthy to communicate to petitioner advance information of the intended robbery. There was no such duty at common law nor any duty assumed in petitioner's contract toward David.

St. L. & S. F. R. Co. v. *Mills*, 271 U. S., 344.

V.

McCarthy Was Not the Agent of Petitioner.

The ruling of the court below to the effect that the secret arrangement made by petitioner with McCarthy to furnish petitioner information of the activities of this gang of thieves and train robbers had the effect of constituting McCarthy the agent of petitioner, so that his uncommunicated knowledge of an intended robbery was imputed to petitioner, is without support either in principle or authority.

An agent is one who transacts some *business* for his principal in the place and stead of the latter. 2 C. J., p. 420, Sec. 4.

By the arrangement with McCarthy he was to *continue to consort with his gang of thieves* as he had been doing prior to the arrangement with petitioner, and was simply to furnish certain information which he should acquire *in carrying on his occupation of thievery.* The continuance of McCarthy in consorting with this gang of thieves as he had been do-

ing prior to this arrangement, and his participation in their secret plans for train robberies and other acts of thievery, and carrying these plans into execution, was not the transacting of any *business of petitioner.* McCarthy used his own means and methods, and was not in any respect under the control of petitioner. He was, therefore, not an agent or servant of petitioner, but was at most an independent contractor.

2 C. J., p. 424, Sec. 10.

3 Words and Phrases, 3d Series, p. 206, title "Employee."

4 Words and Phrases, 3d Series, pp. 222-229, title "Independent Contractor."

VI.

Under the Evidence (R. 41, 42, 43) McCarthy Was the Sole Judge of Whether He Could With Safety to and Without Uncovering Himself to His Associates, Telephone or Otherwise Advise Boultt of the Intended Robbery.

In the very nature of McCarthy's situation this was a matter entrusted to his sole judgment and discretion. No one but McCarthy could know what surveilance was being kept by the gang over his movements. Hayes admitted that he saw McCarthy go into the drug store and that he (Hayes), stopped his automobile in front of the drug store and finally that he and Masterson followed McCarthy into the drug store (R. 123). After leaving the drug store, picking up Gladson and Loar and going to McCarthy's house, where he got a pair of overalls and a jumper (R. 126), that while McCarthy was getting these articles,

the witness and others stopped in the street *where they could see McCarthy all the time* (R. 127). Evidently McCarthy had some intimation from the gang that they were suspicious of him and that this was the real reason that several members of the gang, including their leader, refused to go with him on the night David was killed. It should be remembered that McCarthy was not invited to the Nearman robbery nor the Woolcott robbery.

VII.

There is an entire failure of proof to show that the failure to warn David of the intended attempt to rob the cars had a causal connection with or was the proximate cause of the fatal injury.

St. L. & S. F. R. Co., v. *Mills*, 271 U. S. 344.
Feaster v. *So. Ry. Co.*, 15 Fed. (2nd) 540.
Lowrey v. *Atl. Joint Terminals*, 145 Ga. 782.

VIII.

The Jury Were Left to Conjecture, Speculation and Guess Work Owing to Lack of Evidence to Find.

First. Whether McCarthy made any efforts to communicate with Boultt.

Second. Whether McCarthy had any opportunity without uncovering himself to communicate with Boultt, so as to apprise him of the intended attempt to rob the cars.

There was no evidence that McCarthy had an opportunity to telephone to Boultt nor that there was any telephone in the drug store, nor, if there was one, that McCarthy had access to it.

Third. What David could or would have done and what the railroad company could have done to avert the shooting even though McCarthy had made his report and David had been warned of the intended robbery.

It is respectfully submitted that the judgment below was for the wrong party; that the writ of certiorari should be issued as prayed to the end that the judgment may be reversed.

EDWARD J. WHITE,
THOMAS HACKNEY,
LESLIE A. WELCH,
Counsel for Petitioner.

FILE COPY

JAN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 365

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

REVISED BRIEF FOR PETITIONER.

EDWARD J. WHITE,
of St. Louis, Mo.,
THOMAS HACKNEY,
LESLIE A. WELCH,
of Kansas City, Mo.,
Counsel for Petitioner.

(36179)

INDEX

Opinion Below, 41 S. W. (2d) 179 1

Writ Granted on Timely Application 2

Grounds for Jurisdiction of This Court 2

Questions Presented 3-6

Statement of Case 7-23

- Nature of Action 7
- General Warning to David 7
- Contention that David Should Have Been Specially Warned 7
- Contention of Imputed Knowledge 8
- Excerpts from Petition Below 8
- Answer 9

Excerpts from Testimony of Witnesses—

- R. S. Mitchell 10
- W. H. Boullt 11
- Bert Gladson 15
- Lawrence F. Hayes 16
- Sophia David 19
- L. Q. Moore 19
- C. M. Barber 21

Requests for Directed Verdict for Petitioner Denied 23

Specification of Errors 24

Points, Authorities and Argument—

- I. David assumed risk of fatal injury 26
- II. Petitioner under no legal duty to obtain advance information and warn David of particular time and place of contemplated robberies 28

III. Ineffectual effort to obtain advance information did not make its furnishing a legal duty on petitioner 32

IV. McCarthy's uncommunicated knowledge not imputed to petitioner. McCarthy not agent or representative of petitioner .. 34
McCarthy at most an independent contractor 36

V. McCarthy was the sole judge of whether he could with safety advise Boullt of intended robbery 38

VI. Failure to warn not proximate cause of fatal injury 40

VII. Jury left to conjecture, guess work and speculation 40

CASES CITED

Ashton vs. B. & M. R. Co., 222 Mass. 65 27
Atlantic C. L. R. Co. vs. Southwell, 271 U. S. 64.. 29
Boldt vs. P. R. Co., 245 U. S. 441 26
Casement vs. Brown, 148 U. S. 615 ..... 36, 37
Chicago M. & St. P. R. Co. vs. Coogan, 271 U. S. 472 3
Chicago G. W. R. Co. vs. Crotty, 141 Fed. 913 26
Cudahy Pkg. Co. vs. Marcan, 106 Fed. 645 .....
.....26, 27, 29, 31
Feaster vs. Southern R. Co., 15 Fed. (2d) 540 ..29, 40
King vs. Morgan, 109 Fed. 446 26
Kohn vs. McNulta, 147 U. S. 238 26
Lowrey vs. Atlanta Jt. Term, 145 Ga. 782 .....29, 40
McCann vs. Kennedy, 167 Mass. 23 29
Manwell vs. Dourst, 178 Calif. 752 29

Metcalf vs. Eddy & Mitchell, 269 U. S. 514, 520, 521 ..... 36, 37

Meyers vs. W. C. DePauw Co., 138 Ind. 590 ..... 27, 28

Morey vs. Maine Cent. R. Co., 126 Me. 272 ..... 26, 27, 29, 31

Ring vs. Mo. Pac. Ry., 112 Mo. 220, 230 ..... 29, 30

Seaboard A. L. Co. vs. Horton, 233 U. S. 492 .. 26

Southern Pac. Co. vs. Seley, 152 U. S. 145 26

St. L.-S. F. R. Co. vs. Mills, 271 U. S. 344 ..... 3, 29, 32, 40

Toledo St. L. & W. R. Co. vs. Allen, 276 U. S. 165 ..... 26, 27

TEXT BOOKS CITED

2 Corpus Juris, 424, Sec. 10 ..... 36, 37

30 Corpus Juris, p. 502 29

1 Sherman & Redfield on Negligence, 6th Ed., Secs. 8, 10, pp. 13, 17 ..... 32, 33

3 Words & Phrases, 3rd Ser., p. 206, title "Employee" 36

4 Words & Phrases, 3rd Ser., pp. 222-229, title "Independent Contractor" 36

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 365

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

REVISED BRIEF FOR PETITIONER.

OPINION BELOW.

The opinion of the Supreme Court of Missouri (R. 19-34) has not yet been officially reported, but, since the filing of the application for the writ, has been published in *David* v. *Missouri Pacific R. R. Co.*, 41 S. W. (2nd) 179.

WRIT GRANTED ON TIMELY APPLICATION.

1. On October 26, 1931 (R. 235), this court granted its writ of certiorari herein.

2. The judgment of the Supreme Court of Missouri rendered June 24, 1931 (R. 219), affirming the judgment of the trial court, became final on denial of appellant's (petitioner's) motion for rehearing and motion to transfer to the court *en banc* on July 28, 1931 (R. 234). The Supreme Court is the highest court of the state in which a review of the judgment below could be had.

3. The petition for the writ with supporting brief and proper printed copies of a duly certified transcript of the record and proceedings below, were duly filed in this court September 8, 1931. Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, were duly served by petitioner upon counsel for respondent, within ten days after the filing thereof, and due proof of service of such notice was filed with the clerk of this court.

GROUNDS FOR JURISDICTION OF THIS COURT.

(a) The respondent brought this suit under the Federal Employers Liability Act U. S. C. Tit. 45, Sec. 51, to recover damages for injuries growing out of the death of her husband, an employee of the petitioner while both were engaged in the work of interstate commerce.

(b) The trial court and the State Supreme Court held that the evidence was sufficient to show that petitioner was negligent and was liable under the Act, and sustained an award of damages to respondent therefor. In both courts petitioner challenged the sufficiency of the evidence to show any negligence or liability on its part under the Act.

(c) The rights and obligations of petitioner depend on that Act and the applicable principles of the common law as interpreted by the federal courts. The kind or amount of evidence required to establish liability and the rules applicable to such evidence are not subject to control of the several states.

(d) The rule is well settled that a federal question is thus presented and that this court will, on certiorari, examine the record, and, if it is found as a matter of law that the evidence is not sufficient to sustain the finding that the carrier was negligent and that this negligence was the proximate cause of the injury, the judgment against the carrier will be reversed.

Chicago, M. & St. P. R. Co. v. *Coogan*, 271 U. S. 472, 474 and cases cited.
St. L. & S. F. R. Co. v. *Mills*, 271 U. S. 344.

QUESTIONS PRESENTED.

The questions presented by the petition for the writ, and now before this court on certiorari for its determination are these:

1. Whether in an action under the Federal Employers Liability Act against petitioner, an interstate carrier, brought by the legal representative of a deceased employee, David, an armed train rider who was shot and killed by a train robber while the deceased and another train rider were protecting an interstate train from theft of merchandise thereon, the petitioner was liable for the death of the said deceased on account of not having warned him of that particular intended train robbery. Or, whether the risk of such injury had been assumed by the deceased, an experienced train rider and guard who had been warned of the activities and dangerous character of a gang of train robbers on petitioner's trains, and of the likelihood that train robberies would occur at any time and place, and had been instructed to keep constantly on the alert and to shoot to kill if necessary to protect himself from injury, and had been furnished a loaded automatic revolver and a sawed-off shotgun, loaded with buckshot and had agreed at the time of his employment to cope with such train robbers and was thus armed at the time of his fatal injury.

2. Whether the applicable law of assumed risk was correctly declared by the Missouri Supreme Court in its opinion (R. 230) thus:

> "Although David knew, appreciated and assumed the dangers incident to his employment, it was notwithstanding the continuing duty of his employer to exercise ordinary care to minimize or obviate them."

3. Whether one McCarthy, a known member of an active gang of train robbers and car thieves who, for an agreed compensation, to be paid him by petitioner, secretly agreed to furnish petitioner's Assistant Special Agent Boullt with such advance information as he, McCarthy, by continuing to consort with them, might obtain of this gang's intended robberies of trains of petitioner whenever he could do so with safety and without uncovering himself to his gang—he, McCarthy, to employ his own means, methods and time in obtaining and using this information, all without control of petitioner—was an independent contractor for whose acts or omissions petitioner was not liable. Or whether said McCarthy thereby became the agent or servant of petitioner, so that his uncommunicated knowledge of an intended train robbery was imputed to petitioner and a duty thereby cast upon petitioner of warning David of the particular time and place when this intended train robbery would occur.

4. Whether said McCarthy, if deemed the agent or servant of petitioner, was the sole judge of whether he could or could not with safety and without uncovering himself, telephone petitioner's special agent, Boullt, and advise him of this intended robbery. If not, then whether the evidence was sufficient to prove that McCarthy was negligent in not so advising said Boullt.

5. Whether the secret efforts of petitioner to obtain from McCarthy advance information of intended train robberies, all done without David's knowledge, and without promise to furnish him such information,

rendered the furnishing of such information to David a duty on petitioner's part.

6. Whether, if petitioner was charged with the knowledge which McCarthy had of the intended train robbery, though uncommunicated to petitioner, the failure of petitioner to warn David of the time and place the particular, intended robbery was to be attempted, was, under the evidence, the proximate cause of his death.

7. Whether the evidence was sufficient to show any negligence on the part of petitioner in discharging the duty which it owed to David.

STATEMENT.

This is an action brought under the Federal Employers Liability Act (U. S. C. Tit. 45, Sec. 51), for damages on account of the fatal shooting by Bert Gladson, a train robber, of James Lee David, a train rider for petitioner, while deceased and another train rider were protecting and guarding an interstate train then at Leavenworth, Kansas, on the early morning of May 17, 1923. The respondent is his widow and the administratrix of his estate. The suit was instituted and a trial was had in the Circuit Court of Jackson County, Missouri. On the trial before a jury, respondent recovered a verdict and judgment for $15,000 (R. 1) whereupon, after unsuccessful motions for new trial and in arrest of judgment, petitioner duly appealed to the Supreme Court of Missouri (R. 2) where the judgment was affirmed (R. 219).

It is not disputed by respondent that David was experienced in the character of work in which he was engaged when killed, and that he had been fully armed and warned at the time of his employment of the danger of his work, particularly of the danger of attempts of this same gang of thieves to rob his train; and also that he had observed and appreciated these dangers in his own experience during his employment.

The respondent's contention is that David should have been specially warned by petitioner that Gladson and others intended to attempt to rob his train at the particular time and place when the fatal shooting oc-

curred. This contention is based on the claim that one McCarthy, a member of the same gang of thieves as Gladson, had advance information of the intention of Gladson and others to rob this train at the time and place in question, and that under an arrangement between petitioner and McCarthy the latter had agreed to furnish petitioner with advance information of such contemplated robberies. Respondent contends that this knowledge of McCarthy, though uncommunicated to petitioner was *imputed* to the latter, and that thereby a duty was cast upon petitioner to give David such special warning, or to have protected him against Gladson.

The petition (R. 3) averred:

> "That at some time prior to said 17th day of May, 1923, the defendant in its special agents or police department *negligently* and *wantonly* employed a certain person as an *informant* who was *known by the defendant* at said time to be an *ex-convict*, a *thief* and *robber* who *consorted with thieves, robbers, murderers and other desperate persons* and that defendant instructed said informant to *continue to consort* with thieves, robbers, murderers and persons of desperate character, and to *learn of their plans* and designs, especially with reference to theft or robbery of property of defendant or in its possession and further instructed said informant that whenever he should learn of any proposed robbery or theft of or from the defendant, that said informant should report such fact to defendant *to the end that such thieves or robbers might be interrupted and apprehended.*"

It further averred in substance that said informant at some time before the date of the fatal shooting learned of the intention of certain well known thieves and robbers to rob defendant's train at Leavenworth, Kansas, in the early morning of May 17, 1923. That said informant, the *agent* of defendant, accompanied said thieves to Leavenworth well knowing their design and intent, and that they were armed with firearms and were desperate characters and would take human life in order to accomplish their purpose or to protect themselves if interfered with, and knowing that train riders on the train would be subjected to the hazard of an encounter with said desperate persons and that said informant went with said persons and remained with them until the fatal shooting of David. That defendant through its agents and employees knew of the contemplated robbery in time by the exercise of ordinary care to have frustrated and prevented the same and to have offered protection to said David, and to have warned him of the proposed robbery so that David could have protected himself; that defendant negligently and carelessly failed so to do and as a result David was killed.

The answer (R. 8) consisted of a general denial and a plea of assumption of risk by the deceased.

The only testimony produced on the trial as to McCarthy's employment as an informant and what and how the petitioner expected to obtain from him information was contained in the depositions of R. S. Mitchell, Chief Special Agent of petitioner (R. 11) and W. H. Boullt, Assistant Chief Special Agent (R. 33),

which said depositions were taken on behalf of, and introduced in evidence by, respondent.

In Mr. Mitchell's deposition (R. 16-18) the reasons for his undertaking to obtain secret information from McCarthy, the situation confronting the railroad at the time, and the nature of the information sought are given fully. In brief, his testimony showed that the Missouri Pacific was at the time being harassed and robbed by an organized gang of thieves in and adjacent to Kansas City; that he learned that McCarthy was a member of this gang and would, for a consideration, "be an informant, or 'snitch,' as it is usually called in thief parlance." He testified (R. 17):

> "I arranged with him to keep us informed as to the activities of this gang, to give us advance information if possible when this gang planned to rob our trains, and further arranged with him in the event he could not get to us, couldn't give us advance information, to give us information then as to the 'fence,' where the stuff was taken, as well as who was in the robbery, and all the details possible."

He testified further that he introduced McCarthy to Boullt and arranged with McCarthy to report to Boullt and to make his reports by telephone; that the matter was then turned over by him, Mitchell, to Boullt, and to no one else, for handling with McCarthy. He further testified (R. 29) that his sole purpose in so employing McCarthy was to get information of the activities of this bunch of thieves who had been robbing box cars; that he did not authorize McCarthy to carry a gun nor do any act of apprehending any person or

do any criminal act; that McCarthy was simply to get information; that he was not to stage any robberies, but was simply to continue trailing with these thieves. That after the killing of David, McCarthy assisted in convicting Gladson, who is now serving a life sentence for shooting David.

The testimony of Mr. Boullt with respect to the employment of McCarthy, the reasons therefor, and the activities expected of him, was in line with the testimony of Mr. Mitchell.

On being interrogated as to McCarthy's instructions (R. 41) he said:

> "Well, we couldn't very well give him *instructions*. He was a man to furnish us with *information* where these robberies were committed, who was committing them, and if he could get to us in time, to tell us before the robbery was committed; if not, to tell us what had become of the goods.
> Q. Well, what was the plan and arrangement with respect to whether or not he was to go with this gang on their robbing expeditions?
> A. He was to continue the same as he had, to get information; that is generally *up to the man's own idea*, that is working. * * * His instructions were that he was to get us word before the robbery was committed if he could; if not, to give us information as soon as he could after the robbery had been committed. He was to report this information to myself. I advised him to reach me through the telephone."

Further on he testified (R. 42):

> "Q. Now, you say if it was 'possible' McCarthy was to give you this information in advance of the robbery?

A. If he could, yes, sir.
Q. By 'possible' do you mean if he could do that without letting the gang know he was giving the information?
A. Why, *he would have to use his own judgment about that.* You see *we could not tell him how to use this information.* * * *
Q. But I understand he was to notify you if he could without *tipping off the gang* that he was giving notice?
A. That is right."

This witness further testified (R. 43):

"Q. As to his *ways* and *means* and *methods* of securing this information for you with respect to who this gang was, *when they were robbing you,* and if they had robbed you, what became of the goods, *you left that largely to the discretion of McCarthy.*
A. Yes, to furnish us the information."

The witness then detailed numerous reports of intended robberies made by McCarthy to him, and testified that on preparing to meet the intended robberies, the thieves failed to appear. Asked with regard to the attempted robbery at Leavenworth, in which David was killed, witness said that he first learned of it by getting a telephone call the morning after David was killed. Asked if McCarthy had made any report of this intended robbery prior to its occurrence, he said he had not (R. 49).

He further testified (R. 52) that the first report he had from McCarthy was about 7 o'clock the next morning; that later he had a conversation with McCarthy at the office of witness in Kansas City. He was then asked by respondents' counsel:

"Q. What report did McCarthy make to you in respect to this robbery or attempted robbery?
A. He gave me all the information, who killed David, how it happened and he went to Leavenworth with me to make the report to Mr. McNaughton, the county attorney.
Q. What information did he give you as to who the gang was, where they started from, where it was organized and when the robbery was planned?
A. It started at Kansas City; they drove to Leavenworth in Lawrence Hayes' car, Bert Gladson, Red Loar, Lawrence Hayes and McCarthy.
Q. What did McCarthy say with respect to whether he went over from the automobile to the train armed with a gun or crow bar or other implements?
A. He said he was given a gun by Bert Gladson.
Q. He carried the gun?
A. Yes, sir."

(The following questions and answers in the deposition were then by plaintiff's counsel withdrawn and not read to the jury, but were later (R. 60) offered by defendant but were excluded by the court:)

"Q. What did McCarthy tell you in respect to when they arranged or planned this robbery?
A. That afternoon very late they were riding down Minnesota Avenue and were near the bluff, near the C-G-W Bridge and seen a train coming over to Atchison and Lawrence Hayes made the remark, he says 'there is a good train, let's make it,' and they went back up the street.
Q. Who all was in the gang at that time, did he say?
A. Lawrence Hayes, McCarthy and some other fellow, I forget his name, there was three of them in it. They went back up the street and picked up Bert Gladson and then got Red Loar, then

drove up to a drug store, and McCarthy got out and went in and tried to get a telephone to call me, then this bunch came in on him and that then he bought a rubber doll—I won't say a rubber doll, a doll for his baby, to throw them off, then he wanted to go home to change his clothes in order to call me but they wouldn't let him do it.

Q. At what hour in the afternoon did he say it was when Lawrence Hayes suggested they make the train?

A. I could not tell you exactly; the train was coming across the Kaw River then, they had been riding around together over in Kansas.

Q. Did he say about what hour that was when that occurred?

A. No, he didn't just exactly say what hour.

Q. Did he say he had made any other attempts to communicate with you before this robbery was pulled off?

A. He said he did not have any other chance to do it, only two attempts he made when he went into the drug store and then tried to get them to let him go home and change his clothes."

Mr. Boullt further testified, (R. 56) that McCarthy was to report to no one but him, Boullt. He further testified (R. 57):

"Q. As I understand you, McCarthy was not to report an intended robbery to you unless he could do it without letting the gang know that he was so reporting?

A. Not so he would uncover himself.

Q. So they would get on?

A. Yes.

Q. Was McCarthy instructed to instigate any robberies in order to lead the gang into a trap?

A. No, sir."

The only other evidence of the time and place of the planning of the robbery and of what occurred between that time and the time of the fatal shooting was that offered by the plaintiff below in the depositions of Gladson and Hayes, taken in the Lansing State Penitentiary, where each was serving a sentence under conviction for the killing of David.

Gladson testified that the gang, including McCarthy, were on the 16th day of May, hanging around the courthouse in Kansas City, Kansas, listening as spectators to the trial of one Hogie Ward, who was then being tried for the pay roll holdup of Wilson & Co. (R. 62); that at along about noon of that day he had some talk with McCarthy about robbing the Missouri Pacific box cars at Leavenworth that night (R. 63). Asked whether any plan or arrangement was made at noon to commit this robbery, he answered (R. 63):

> "A. Why all the boys what belonged to the gang was supposed to go down to Riley's house right after the trial. * * * Then they was going to make arrangements to try to get two cars to go up; some of the boys didn't want to come up."

He further testified (R. 66) in substance that the gang left the court room about six in the evening and went to Riley's house; that there were two car loads of them. Asked further about their plan, he testified (R. 67):

> "Why we consulted all of us down there, and some of them didn't want to go so we who did want to go—it was I and McCarthy and Lawrence

Hayes and Charles Masterson, four of us started and made it up to go that night about six-thirty or something like that. * * * I had a date with a girl that night so I wanted to go up and see and put it off and Charles Masterson had to go to see the doctor so Lawrence Hayes and McCarthy and I and Masterson went up to Wyandotte and I got off at 10th and Central and Masterson went up to the doctor's office so I made a date with him to meet me as he was going back. * * *

Q. To meet you where?

A. At 10th and Central.

Q. Where were they going?

A. To the doctor's office, and then go down to see this freight go through (Kansas City, Kansas) *and see what was on it.*

Q. Where did they say they were going to see the freight, to what street or crossing?

A. It foots there at 3rd and Minnesota.

Q. What was the purpose of going down to see the train as it went through?

A. Why mostly to see if there was *any good merchandise on it.*"

The testimony shows that McCarthy was with some of the gang all the time from when they first discussed the matter of robbing the Missouri Pacific train until about 8 o'clock that night (R. 122).

Hayes testified, that McCarthy got out of Hayes' car and said he was going to the drug store; that witness saw McCarthy go into the drug store, and in a few minutes witness stopped his car directly across from and in front of the drug store; that witness and Masterson then joined McCarthy in the drug store. Asked what McCarthy was doing when he got in the drug store witness answered (R. 124):

"Why I don't know, I guess he was looking around the place. I don't even know what he went there for. I guess he wanted a drink or something. But he was not drinking when we got there. He joined us in a drink."

Witness then testified that afterwards they went from the drug store and picked up Gladson; that Masterson did not accompany them; that they went to the foot of Minnesota Avenue where a freight train was pulling in and they got out of the car and watched the freight train go by; that after picking up Gladson and Loar, they went to the home of McCarthy; that McCarthy went onto the front porch and got a pair of overalls and a jumper he had there (R. 126) and that while he did so, the witness and others stopped in the street *where they could see McCarthy all the time* (R. 127).

Testifying further as to the arrangement to rob the particular train that David was guarding when killed, Hayes said (R. 154):

"Q. The talk you had with McCarthy when you started out was that you were going to rob some box cars, you didn't know just what box cars you were going to rob?
A. He suggested the Missouri Pacific himself.
Q. He suggested that to you but you had not made any plan to rob any *particular train* until you started from Riley's house?
A. Until we went down to the foot of Minnesota Avenue, we *didn't know we were going to rob that train then.*"

There was no evidence tending to show that McCarthy had any opportunity after the robbery had

been planned to withdraw himself from the other members of the gang and go to a telephone and communicate information of the intended robbery to Boullt. The only attempt to show such opportunity was by the testimony of Hayes as to McCarthy's going into the drug store after stating his intention to go there, and of Hayes having observed him going into the drug store and, kept surveilance over his movements then until he and Masterson joined McCarthy.

There was no evidence that there was *any telephone* in the drug store, *nor*, if *one was there*, that McCarthy had the *privilege* or *opportunity to obtain access to it*, and communicate with Boullt before Hayes and Masterson joined him in the drug store.

It was affirmatively shown that when McCarthy afterwards went to his own home to get a pair of overalls and a jumper (R. 126), Hayes stopped his car in such position, that, as he expressed it (R. 127), "*We could see him all the time.*"

No explanation was given by Hayes as to why he was keeping such close watch on McCarthy's movements.

Hayes further testified on cross examination (R. 152-153) that he participated in the train robbery at Nearman, Kansas, between Kansas City and Leavenworth, of this same train about a month before David was killed, in which robbery Masterson was shot; that the "bulls" (train riders) did the shooting; that Gladson and Masterson were armed; that McCarthy was not with them that night. He further testified (R. 139)

that on the night of May 2nd, about two weeks before David was killed, he, Hayes, participated in a robbery of the same train at Wolcott (between Kansas City and Leavenworth); that Bert Gladson, Red Loar, George Riley, Hobert Ward, Freddie Thompson, John Rock, Sonny Davis, George Oftener and himself participated in that robbery; that they had two automobiles and robbed most of the whole train; that they held up the brakeman and made him stand still at the road crossing while they robbed the train; that they loaded the stuff into the trucks and got away.

Sophia David, the widow, testified (R. 172-176) that her husband worked for a coal company during a strike in Kentucky several years previously, his work being that of looking after the place for others, where they had a machine gun with a headlight on top of the building; that from 1911 to 1915 her husband was employed by the Pinkerton Detective Agency as a guard walking a beat for them in Kansas City, and that he was armed at the time of such service. Further, that during the time he was working for the Missouri Pacific he had in his possession and carried a *revolver* and a *sawed-off shotgun.*

L. Q. Moore, a witness for defendant, testified: That he was a special agent for the Missouri Pacific (R. 178 *et seq.*) and to his having become acquainted with David in Kentucky where David worked for him a few months in 1907 or 1908 during the coal strike, during which time David was armed and on one occasion David had kept another man from shooting him, Moore; that he next saw David on December 18, 1922,

and talked with him regarding a job on the Missouri Pacific. David wanted a job as special agent or train rider if such a job was open; that arrangements were then made for David to meet Mr. Barber, another official of the Missouri Pacific, whereupon he took him to Barber with a view of such employment, and conversation was had between Barber and David regarding his duties and the nature of the position; that Barber told David there was a lot of thieves on the road and he had a position open as a train rider; that they were having a lot of train robberies and said that there was a position open. He further said, "I want to know whether you will fight these fellows or not," to which David replied, "*I will fight them until I die.*" That thereupon arrangements were made for David to start to work; that David was provided with a .45 automatic Colt revolver and a sawed-off No. 12 shotgun, loaded with No. 1 buckshot; that David and another train rider named Boyd were assigned to riding trains between Kansas City and Leavenworth; that witness told David to be careful and look out for these fellows, and also gave him all the pointers he could.

> "Q. State what you said about the danger if any of dealing with these men.
> A. I told him they would shoot him just as quick as they saw him and to be careful—'be careful and watch your step,' is about what I said to him."

This witness further testified (R. 184) that during the time of David's employment in this work, until the witness left Kansas City, he saw David every morning

when he came in; that he had the sawed-off shotgun and revolver at all times.

C. M. Barber, Assistant Chief Special Agent of the defendant, occupying the place Mr. Boullt occupied prior to his death, testified (R. 192-201) that he was formerly special agent for defendant, his general duties being to employ men to guard the company's property in the capacity of special agent.

The witness testified to the circumstances of his employment of David and the nature of the work he wanted done. He testified (R. 194): "I told him (David) that we were having a great deal of trouble with a bad gang of train robbers robbing our trains en route, and that I was looking for a man of sufficient ability to cope with them—a man who was not afraid to cope with them and a man who would shoot and use good judgment and watch things, and if necessary to possibly kill them, and after I had gone over the matter thoroughly with him, he said 'I will take the job,' or words to that effect. * * * I explained to him that they had been robbing the trains en route, throwing the stuff out en route, and they were a large gang and a bad gang, that they were armed, all of them, and that all of them would shoot him on sight and that he had to be very careful about his own life."

He testified further (R. 195) that David was carrying a pistol and a sawed-off shotgun; that they were given him for the purpose of defending himself and the company's property * * * "there was a general instruction out to all our men to carry their arms anywhere they go, anywhere so they could get hold of

them, because they were told they would be liable to need them at any time."

The witness then (R. 195-196) detailed the circumstances of the train robbery at Wolcott about two weeks previous to David's shooting; that that was on the train David was to have ridden that night but which train David had left chasing some thieves in the Kansas City yards and the train pulled out and left him; he further testified that David was fully advised as to what occurred up at Wolcott that night, along with the other man; that Boyd usually rode this train with David; Boyd was armed with a pistol; he was not sure whether he carried a shotgun; that all train riders were supposed to carry flashlights with which not only to examine seals but to protect the train rider from hiding bandits between the cars. Asked if there had been any other attempts to rob the train other than this Wolcott robbery up to that time, the witness answered "Many, many." He further testified (R. 198) that prior to the killing of David, two of the Kansas City, Kansas, thieves, Loar and Gladson, had been tried and convicted of an Osawatomie, Kansas, robbery and were then out on bond.

The witness further testified (R. 199) that he did not advise other special agents, or train riders or anyone of the employment of McCarthy; that this employment was kept a secret; that it was not calculated to come to the knowledge of any of the company's employees outside of the heads who employed him. Witness further testified that he had no knowledge of the purpose of Gladson and others to rob this train before

David was killed; that he first learned of the killing early the next morning. He further testified on cross examination (R. 200) that he had never known McCarthy prior to the time David was killed nor come in contact with him at any time; that he had nothing to do with the employment of McCarthy.

On the trial the petitioner challenged the sufficiency of the evidence to establish liability on its part by asking at the conclusion of the plaintiff's evidence that the court give to the jury a peremptory instruction to find the issues in favor of the defendant. This request was denied (R. 178).

At the conclusion of all the evidence petitioner (R. 203) renewed its request for a directed verdict which was also denied.

SPECIFICATION OF ERRORS.

The Supreme Court of Missouri erred in its decision in the following particulars:

1. It erred in its ruling that although David was informed of the dangers and assumed the risk of injury therefrom, there was notwithstanding a continuing duty on the petitioner to minimize or obviate them.

2. It erred in not ruling that David, having been fully warned of the danger of combating this particular gang of thieves, and having agreed to cope with them and protect himself and petitioner's property against them, and having been heavily armed for that purpose, he thereby assumed the risk of being killed in so protecting himself and petitioner's property.

3. It erred in ruling that petitioner having fully warned David of the danger of coming into contact with this gang of car thieves, it was still petitioner's continuing duty to obtain advance information of intended robberies and to warn David of the particular time and place such attempts at robbery would occur.

4. It erred in ruling in effect that McCarthy's agreement with petitioner to furnish it with information of intended robberies constituted McCarthy the agent, representative or *alter ego* of petitioner so that McCarthy's knowledge of a contemplated robbery was imputed to petitioner though not in fact communicated to it.

5. It erred in not ruling that the ineffectual and gratuitous efforts of petitioner to secretly obtain from McCarthy advance information of intended robberies, all without David's knowledge, imposed no legal duty on petitioner to obtain such information and warn David thereof, and in not further holding that petitioner's failure to so obtain such information and warn David did not constitute actionable negligence.

6. It erred in not ruling that the evidence was insufficient to show liability on petitioner's part and that the trial court should have directed a verdict in its favor.

7. It erred in its ruling that the evidence was sufficient to support the verdict.

8. It erred in not reversing the judgment of the trial court.

POINTS, AUTHORITIES AND ARGUMENT.

I.

Under the Evidence and the Applicable Law as Interpreted by the Federal Courts, David Assumed the Risk of His Fatal Injury and Petitioner Is Not Liable for His Death.

In his contract of employment, David assumed the risk of being shot by a train robber in protecting petitioner's trains from robbery. He was employed and fully armed for this express purpose. He was fully apprised of all the dangers attending his work. He was experienced in that particular kind of work.

It is well settled in an unbroken line of decisions of this court and other federal courts, and of numerous state courts, that he assumed the risk of his fatal injury and that no recovery can be had against petitioner.

Boldt v. *Penna. R. Co.*, 245 U. S. 441, 445.

Toledo St. L. & W. R. Co. v. *Allen*, 276 U. S. 165, 168, 169.

Cudahy Pkg. Co. v. *Marcan*, (8th C. C. A.), 106 Fed. 645, 647.

King v. *Morgan*, (8 C. C. A.) 109 Fed. 446, 450.

Chi. G. W. Ry. Co. v. *Crotty*, (8th C. C. A.) 141 Fed. 913, 916.

So. Pac. Co. v. *Seley*, 152 U. S. 145.

Kohn v. *McNulta*, 147 U. S. 238.

Seaboard Air Line R. Co. v. *Horton*, 233 U. S. 492, 504.

Morey v. *Maine Central R. Co.*, 126 Me. 272, 133 Atl. 92.

Ashton v. *Boston & M. R. Co.*, 222 Mass. 65, 109 N. E. 820.

Meyers v. *W. C. DePauw Co.*, 138 Ind. 590, 38 N. E. 37.

A late expression of the rule by this court, which is in full harmony with the other cases cited, is found in *Toledo St. L. & W. R. Co.* v. *Allen, supra,* where this court said, *inter alia*:

> "And except as specified in Section 4 of the Act (45 U. S. C. A., Sec. 54), the employee assumes the ordinary risks of his employment, and when obvious, or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees."

In *Cudahy Packing Co.* v. *Marcan, supra,* Judge Sanborn, in discussing the effect of an assumption of risk by the servant, said, at page 647 of the opinion:

> "By entering upon and continuing in the employment, he assumes these risks and dangers, and no negligence can be charged to the master and no liability can be fastened upon him because he fails to give notice or warning of, or to remove these common risks of the employment."

In *Morey* v. *Maine Central R. Co., supra,* in discussing the assumption of risk by the servant, it is said:

> "Dangerous work must be performed; and work must be done in dangerous places, and when a workman makes a contract to do such work, or to work in a dangerous place, he contracts with reference to that danger and assumes the 'open and obvious risks incident to the work' or, as some times expressed, 'such dangers as are normally

> and necessarily incident to the occupation.' This is a contractual assumption of risk. *Ashton* v. *B. & M. R. Co.*, 109 N. E. 820; 222 Mass. 65, 69; *Seaboard Air Line Co.* v. *Horton*, 233 U. S. 492. With reference to risks and dangers covered by the contract the employer owes the employee no duty and so cannot be held guilty of negligence."

In *Meyers* v. *W. C. DePauw Co., supra,* the Supreme Court of Indiana, said:

> "The fact that the service is a dangerous one adds nothing to the liability of the master for injuries resulting from the natural and ordinary incidents of the undertaking."

II.

Petitioner Was Under No Legal Duty to Obtain Advance Information and Warn David of the Particular Time and Place Attempts to Rob His Train Were Contemplated.

The danger of coming into contact with thieves and train robbers while attempting to rob his train was one of the common, momentary and transitory risks of David's employment, of which he had been fully warned and had observed from his own experience. These risks inhered in the performance of his ordinary duties and were assumed by him. The only thing he did not know *was the precise time and place when and where this danger would exist.*

Neither in his contract of employment, nor, by the course of conduct of the parties thereafter, was David promised or given any reason to believe that he would be furnished advance information of attempts at robberies. He had no reason to expect, and did not expect, to receive such information.

Petitioner was therefore under no legal duty to keep watch over David and warn him that Gladson would attempt to rob the train at the time and place of the fatal shooting.

McCann v. *Kennedy*, 167 Mass. 23.
Ring v. *Mo. Pac. R. Co.*, 112 Mo. 220, 230.
St. L.-S. Ry. Co. v. *Mills*, 271 U. S. 344; 46 Sup. Ct. 520.
Atlantic Coast Line v. *Southwell*, 271 U. S. 654; 48 Sup. Ct. 25.
Lowrey v. *Atlanta Joint Terminals*, 145 Ga. 782; 89 Southeastern 832.
30 C. J. p. 502.
Manwell v. *Dourst*, 178 California 752; 174 Pacific 881; 1 A. L. R. 669.
Feaster v. *Southern Ry. Co.*, 15 Fed. 2d. 540.
Cudahy Pkg. Co. v. *Marcan*, (8 C. C. A.) 106 Fed. 645, 647.
Morey v. *Maine Central R. Co.*, 126 Me. 272; 133 Atl. 92, 93.

In *McCann* v. *Kennedy*, 167 Mass. 23, Mr. Associate Justice Holmes, while a member of the Supreme Judicial Court of Massachusetts, gave expression in concise terms to the underlying principle limiting the master's duty thus:

> "But the danger was momentary, and it would be impracticable to require employers to warn their men of every such transitory risk when the only thing the men do not know is the *precise time* when the danger will exist. *Flynn* v. *Campbell*, 160 Mass. 128, 130." (Italics supplied.)

In *Atlantic Coast Line R. Co.* v. *Southwell*, 275 U. S. 64, at page 65, Mr. Associate Justice Holmes, in denying the liability of the railroad company for the murder of one of its employees, said:

> "It would be straining the language of the act somewhat to say in any case that a willful homicide 'resulted' from the failure of some superior officer to foresee the danger and to prevent it."

In *Ring* v. *Mo. Pac. R. Co.*, 112 Mo. 220, at page 230, the court said:

> "It would be most unreasonable to require the master to keep special watch over every employee and warn him of every common danger to which he might be subjected in the performance of his ordinary duties, and the law does not require it."

The foregoing authorities, considered in connection with those cited under Point I of this brief, certainly demonstrate that the Supreme Court of Missouri in its opinion (R. 230) did not properly declare the applicable law of assumed risk when it said:

> "Although David knew, appreciated and assumed the dangers incident to his employment, it was, notwithstanding, the continuing duty of his employer to exercise ordinary care to minimize or obviate them."

If, as held by the court below, petitioner owed to David the duty of employing someone to ferret out in advance intended robberies and to communicate that knowledge to petitioner, so that it in turn might warn David, then by this same rule, the person engaged to ferret out the intended robberies (which in itself is an extremely precarious calling) would be entitled to like protection from some other person of petitioner's

procurement, and that person in turn would be entitled to similar protection and so on *ad infinitum.* There would, therefore, under this rule, be no end to the requirements of extra employments nor limit to the range of duty of the petitioner.

If the risk of a particular danger is once assumed by the servant then no negligence can be predicated against the master on account of the existence of the danger.

The rule was tersely expressed by Judge Sanborn in *Cudahy Pkg. Co.* v. *Marcan, supra,* where after holding that there had been an assumption of risk by the servant, he stated the effect thus:

> "* * * *and no negligence can be charged to the master and no liability can be fastened upon him because he fails to give notice or warning of, or to remove, these common risks of the employment.*" (Italics supplied.)

Likewise the Supreme Court of Maine well expressed the same rule in *Morey* v. *Maine Central R. Co., supra,* where it said:

> "With reference to risks and dangers covered by the contract, the employer owes the employee no duty and so cannot be held guilty of negligence."

Carried to its logical conclusion, the ruling of the court below would require the petitioner, after employing and arming David to protect its train from thieves, and obtaining from him an express agreement to cope with them, to still further employ some other person to go in advance of David and frustrate in-

tended robberies so as to prevent the thieves from coming into contact with him.

III.

The Ineffectual Effort of Petitioner, Voluntarily Undertaken Without David's Knowledge, To Do More In Anticipating Robberies and Obtaining Advance Information Thereof Than It Was Obliged To Do, Did Not Make the Furnishing of Advance Information Thereof To David a Duty On Petitioner's Part.

Regardless of whether McCarthy was the agent or servant of petitioner, or occupied a relation analogous to that of an independent contractor, petitioner was not legally responsible to David for the failure of McCarthy to communicate to petitioner advance information of the intended robbery in question.

David knew nothing of the arrangement with McCarthy, and neither by his contract of employment nor by anything done by petitioner thereafter did he have any reason to expect or believe that he would receive such advance information. Petitioner's efforts to so obtain and use such information were wholly gratuitous and did not flow from any duty imposed by the law. Hence, the petitioner's failure, from whatever cause, to obtain and warn David of this information is not actionable negligence.

St. L.-S. F. R. Co. v. *Mills*, 271 U. S. 344, 346, 347.

1 Sherman & Redfield on Negligence, (6th Ed.) Sec. 8, p. 13, also Sec. 10, p. 17.

In *St. L.-S. F. R. Co.* v. *Mills*, *supra*, Mr. Associate Justice Stone in denying liability in a case quite

similar in many of its features to the instant case, said, at page 346 of the opinion:

> "There was no evidence that petitioner had ever furnished decedent or any other employee with more than one guard in going to and from work, or any other evidence from which it could be inferred that petitioner had undertaken or held itself out as undertaking to furnish more protection to the decedent or its other workmen than it actually did furnish."

At page 347 he said:

> "The respondent here asserts that the defendant having assumed to do something should have done more. But the bare fact that the employer voluntarily provided some protection against an apprehended danger by undertaking to do something which involved no special knowledge or skill can give rise to no inference that it undertook to do more. Respondent therefore relies on a breach of duty which does not exist at common law and of whose genesis in fact it offers no evidence."

In Sherman & Redfield on Negligence, *supra,* at page 13, it is said:

> "If there is no duty there can be no negligence."

Again at page 17, the same authors say:

> "It is only the lack of such care or diligence as the law demands in the particular case which constitutes negligence."

Again the same authors say:

> "All duties of imperfect obligation imposed only by generosity, kindness, charity or even ab

stract justice but not by the law of the land, are necessarily excluded."

IV.

McCarthy's Uncommunicated Knowledge of the Intended Robbery Is Not Imputed To Petitioner. He Was Not Petitioner's Alter Ego, Agent, Servant or Representative.

The amended petition (R. 5) described McCarthy as a person "known by defendant to be an ex-convict, thief and robber, who consorted with thieves, robbers, murderers and other desperate persons." It charged defendant with having instructed him "to continue to consort with 'such thieves' etc."

The undisputed evidence showed that Mr. Mitchell, the Chief Special Agent and Mr. Boullt, Assistant Chief Special Agent of petitioner, simply made an arrangement with McCarthy, a known member of this gang of thieves, and who had recently been convicted of robbing one of petitioner's cars (R. 55, 71) whereby for an agreed compensation McCarthy promised to secretly furnish Mr. Boullt with such advance information as he, McCarthy, by continuing to consort with these thieves might obtain of their intended robberies of petitioner's trains, whenever he could do so with safety and without uncovering himself to his gang; that McCarthy was to employ his own *means, methods* and *time* in obtaining this information, and, in using and furnishing it to petitioner. He was at no time under or subject to any order, direction or control of petitioner. He was not to do any work for petitioner, but was to continue to ply his own private occupation of

thievery. He did not agree to enter generally into the service of petitioner and do whatsoever petitioner called upon him to do.

The sole effect of this arrangement was to obtain the promise of McCarthy to betray the confidence of his fellow criminals and to sell to petitioner for a consideration, information of their activities in perpetrating robberies against petitioner only. He was left free to keep secret their activities and his profits of depredations against the property of all others.

So far as the rights and liabilities of the respective parties in the instant case are concerned, it makes no difference whether McCarthy be called in underworld parlance "snitch," "stool pigeon," "squealer," or "informant," or whether his status be described in the more elegant nomenclature of "independent contractor," or "seller of secret information," or "betrayer of his fellow thieves." It suffices to say that while plying his vocation of thievery with the particular gang of thieves with whom he was associated, he was not in any sense the *agent* or *representative* of petitioner.

Thievery was not a business in which the petitioner could lawfully engage. Yet, it must be deemed to have been so engaged, if McCarthy was its agent or representative, in doing what he did.

The trial court (R. 203) was impressed with, and deemed the petitioner blameworthy because of the fact that it had sought this information from an "unworthy source;" that it ought to have engaged the services of a more "intelligent" and "trustworthy"

person. In other words, that petitioner ought not to have endeavored to use *a thief to catch a thief,* but should have employed for that purpose someone in *higher social standing,* who did not indulge in the occupation of thievery.

In selecting McCarthy as the instrument to obtain this secret, confidential information, petitioner had no choice of persons. The *delectus personae* was wholly lacking. McCarthy was the only one to be found who would betray the confidence of his fellow criminals.

Petitioner did not by the arrangement clothe McCarthy with any power or authority in its behalf to perform any duty which it owed to the public.

An agent is defined in 2 C. J. 420, to be one who acts for, or in the place of another, by authority from him, one who transacts some business or manages some affairs of another by authority and on account of the latter. He is a substitute, a deputy appointed by the principal with power to do the things which the principal may or can do. The business must be a lawful business.

McCARTHY WAS AT MOST AN INDEPENDENT CONTRACTOR:

2 C. J. p. 424, Section 10.
3 Words & Phrases, (3d Series) p. 206, title "Employee."
4 Words & Phrases, (3d Series) pp. 222, 229, title "Independent Contractor."
Casement v. *Brown,* 148 U. S. 615.
Metcalf v. *Eddy & Mitchell,* 269 U. S. 514, 520, 521.

In *Casement* v. *Brown, supra,* where Casement and Company had been employed to do certain work for the railroad companies, this court in holding them to be independent contractors and not servants of the railroads said:

> "The will of the (Railroad) companies was represented only in the result of the work and not in the means by which it was accomplished. This gave to defendants the status of independent contractors. * * * *They (Casement & Co.) did not agree to enter generally into the service of the companies and do whatsoever their employers called upon them to do but they contracted for only a specific work.*" (Italics supplied.)

In *Metcalf* v. *Eddy & Mitchell, supra,* in ruling that the plaintiffs below were not employees but were independent contractors, Mr. Associate Justice Stone at pp. 520, 521 said:

> "Nor do the facts stated in the bill of exceptions establish that the plaintiffs were employees within the meaning of the statute. So far as appears they were in the position of independent contractors. * * * In each instance the performance of their contract involved the use of judgment and discretion on their part and they were required to use their best professional skill to bring about the desired result. This permitted to them liberty of action which excludes the idea of that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor."

In 2 C. J. Sec. 10, P. 424, the distinction between agent and servant on the one hand and independent

contractor on the other, and the liability or non-liability of the employer for their respective acts, is tersely stated thus:

> "The liability of an employer for the acts and contracts of one employed to work for his interests often turns on the distinction between agent or servant on the one hand and independent contractor on the other. For the acts of the agent or servant within the scope of his employment the employer is in general liable; for the acts of the independent contractor in general he is not. In so far as the employer retains the right of general control and management of the work, he makes the employee his agent or servant; but in so far as the employer leaves the choice of means and methods to the employee, he makes him an independent contractor."

V.

McCarthy Was the Sole Judge of Whether He Could With Safety to and Without Uncovering Himself to His Associates Telephone or Otherwise Advise Boullt of the Intended Robbery.

Mr. Boullt, a witness for respondent, when asked about McCarthy's instructions and plan of operations said (R. 41):

> "Well, we couldn't very well give him *instructions.* He was a man to *furnish us with information.* * * * That is generally up to the *man's own idea* that is working."

On page 41 inquired of about McCarthy's use of the information, he said:

> "*Why he would have to use his own judgment about that. You see we couldn't tell him how to use this information.*"

On page 43 respondent's counsel below asked this question:

> "Q. As to his *ways* and *means* and *methods* of securing this information for you with respect to who this gang was, *when they were robbing you,* and if they had robbed you what became of the goods, *you left that largely to the discretion of McCarthy?*
> A. *Yes, to furnish us the information.*"

In the very nature of McCarthy's situation this was a matter entrusted to his sole judgment and discretion. No one but McCarthy could know what surveilance was being kept by the gang over his movements. Hayes admitted that he saw McCarthy go into the drug store and that he (Hayes), stopped his automobile in front of the store and finally that he and Masterson followed McCarthy in (R. 123). After leaving the drug store, picking up Gladson and Loar, they went to McCarthy's house, where he got a pair of overalls and a jumper (R. 126); and while McCarthy was getting these articles, the witness and others stopped in the street *where they could see McCarthy all the time* (R. 127). Evidently McCarthy had some intimation from the gang that they were suspicious of him and that this was the real reason that several members of the gang (R. 171), including their leader, refused to go with him on the night David was killed. It should be remembered that McCarthy was not invited to the Nearman robbery nor the Wolcott robbery.

VI.

There Is an Entire Failure of Proof to Show That the Failure to Warn David of the Intended Attempt to Rob the Cars Had a Causal Connection With or Was the Proximate Cause of the Fatal Injury.

St. L. & S. F. R. Co. v. *Mills,* 271 U. S. 344.
Feaster v. *So. Ry. Co.,* 15 Fed. (2nd) 540.
Lowrey v. *Atl. Joint Terminals,* 145 Ga. 782.

VII.

The Jury Were Left to Conjecture, Speculation and Guess Work Owing to Lack of Evidence to Find:

First. Whether McCarthy made any efforts to communicate with Boullt.

Second. Whether McCarthy had any opportunity without uncovering himself to communicate with Boullt, so as to apprise him of the intended attempt to rob the cars.

There was no evidence that McCarthy had an opportunity to telephone to Boullt nor that there was any telephone in the drug store, nor, if there was one, that McCarthy had access to it. He was given no opportunity to use the telephone at his own home. The gang had him under observation all the while he was at each place.

Third. What David could or would have done and what the railroad company could have done to avert the shooting even though McCarthy had made

his report and David had been warned of the intended robbery,

It is respectfully submitted that the judgment below was for the wrong party, and that it should be reversed.

EDWARD J. WHITE,
THOMAS HACKNEY,
LESLIE A. WELCH,
Counsel for Petitioner.

FILE COPY

JAN 1

CHARLES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 365

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

REPLY BRIEF FOR PETITIONER.

EDWARD J. WHITE,
of St. Louis, Mo.,
THOMAS HACKNEY,
LESLIE A. WELCH,
of Kansas City, Mo.,
Counsel for Petitioner.

(36179)

INDEX

I. Petitioner Not Estopped to Contend that McCarthy Was Not Its Agent or Employee 1

II. No Concession Below that McCarthy Was Such Agent 4

III. David Did Not Know of Petitioner's Engagement With McCarthy 9

Cases Cited

Casement vs. Brown, 148 U. S. 615 9
Chicago M. & St. P. R. Co. vs. Coogan, 271 U. S. 472 3
Driscoll vs. Towle, 181 Mass. 416 9
Fink vs. Furnace Co., 82 Mo. 276 6
Lawhon vs. St. Jos. Vet. Lab., 252 S. W. 44, 48 7
Painter vs. Mayor of Pittsburgh, 46 Pa. St. 313 7
Standard Oil Co. vs. Anderson, 212 U. S. 215 8
St. Louis-S. F. R. Co. vs. Mills, 271 U. S. 344 4
Thomassen vs. West St. L. Water & Light Co., 312 Mo. 150 7

Text Books Cited

Cooley on Torts, (2nd Ed.) p. 647 7
2 Corpus Juris, Sec. 10, p. 424 8
14 Ruling Case Law, p. 67, Sec. 3 8
2 Thompson on Negligence, Sec. 22, p. 899 6
Wharton on Negligence, Sec. 181 7
4 Words and Phrases, (3d Series) pp. 222-235 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 365

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

REPLY BRIEF FOR PETITIONER.

I.

Petitioner is not estopped to contend here that McCarthy was not its "officer, agent or employee" within the meaning of these terms as used in the Employers Liability Act for whose knowledge and failure to act petitioner could be held responsible.

Respondent asserts that this point was not raised in the trial court. This contention is wholly without

merit. The request of petitioner, defendant below, for a directed verdict at the close of plaintiff's evidence, and the renewal of this request at the close of all the evidence, each of which requests was denied by the trial court, and exceptions duly taken, sufficiently raised the point.

It will be noted that the trial court in overruling this request at the close of all the evidence expressly held (R. 203) that McCarthy's knowledge was *imputable* to petitioner. Plaintiff's instruction No. 1, given by the court, was based squarely on McCarthy's knowledge and his failure to communicate that knowledge to petitioner. The exception to the giving of this instruction was of itself sufficient to preserve petitioner's contention, even had there been nothing more.

Respondent also asserts that the point was not raised in the Missouri Supreme Court by any assignment of error and quotes from the opinion of that court this excerpt taken from the appellant's brief:

> "The sole question presented in the trial court and pressed here is whether or not any negligence of the defendant was shown and if so whether it was the proximate cause of David's death."

The Supreme Court did not undertake to set out the various assignments of error nor the reasons assigned by the appellant for the insufficiency of the evidence nor the various reasons urged by appellant as the basis of its contention that the evidence was insufficient to show negligence, etc. That court, with-

out assigning any reason therefor, simply treated McCarthy's knowledge as that of petitioner and held petitioner liable for failure to give David warning on account of this imputed knowledge. That court necessarily ruled that McCarthy was an agent or employee of petitioner within the meaning of the Act. Otherwise, it could not have held that McCarthy's knowledge was petitioner's knowledge and could not have held that the cause was properly submitted to the jury.

The evidence being undisputed on the question of the character of McCarthy's employment as an informant, and the nature and character of the information sought to be obtained, and the circumstances under which information from him had been contracted for by petitioner, the case was then resolved into a pure question of law, whether under the Act the relation shown to have existed between petitioner and McCarthy was such as to make petitioner responsible for his uncommunicated knowledge or his failure to promptly communicate that knowledge to petitioner.

In *Chicago, M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472, this court in dealing with the question of the sufficiency of the evidence to show liability under the Act, speaking through Mr. Justice Butler, at page 474, said:

> "The rights and obligations of the petitioner depend upon the Act and applicable principles of common law as interpreted by the Federal Courts. The employer is liable for injury or death resulting in whole or in part from the negligence speci-

> fied in the Act and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states."

Speaking directly on the point under consideration here, he said:

> "This court will examine the record and if it is found as a matter of law that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death judgment against the carrier will be reversed."

In *St. L.-S. F. R. Co.* v. *Mills,* 271 U. S. 344, in speaking on this same subject, Mr. Justice Stone said, at pages 345, 346:

> "Petitioner argues that the evidence did not warrant the submission of any of these questions to the jury and contends among other objections that there is no evidence of a breach of any duty owing by petitioner to respondent. The question of law thus raised goes directly to the right to recover under the Act upon which the action was based."

II.

There was no concession below by petitioner that McCarthy was an officer, agent or employee of petitioner within the meaning of these words as used in the Act. Neither did the use of such words as "employed," "employer," "employee" or "employment" by the witnesses in referring to the arrangement with McCarthy constitute evidence that McCarthy was such agent, servant or employee.

Respondent contends that petitioner by its instruction No. 4 (R. 206) conceded on the trial that

McCarthy was its employee and contends that the use in the instruction of the words "employed" and "employment" and the use of similar words in the testimony of witnesses referring to the engagement of McCarthy prevents petitioner from contending here that McCarthy was not an employee within the meaning of the Act. This contention is likewise wholly without foundation.

In the first place, this instruction was requested after the trial court had refused to direct a verdict for petitioner on the theory that McCarthy's knowledge and failure to act did not thrust liability on petitioner. The trial court having held that McCarthy's knowledge was *imputed* to petitioner, said court was then under the necessity of submitting the case to the jury on that theory. The court having ruled that there was evidence that McCarthy was an employee in the sense intended by the Act, and having given plaintiff's instruction No. 1 on that theory (R. 202), and petitioner, having excepted to such ruling and the giving of such instruction, it did not concede such ruling to be correct when it requested instruction No. 4. This instruction simply told the jury that even though they might find from the evidence "that defendant's officers and agents employed one McCarthy as an informant * * * and that prior to and at the time of such employment they knew McCarthy was a thief * * * yet such employment by them of McCarthy as such informant was not unlawful; and that defendant is not by reason of such employment liable for the act of McCarthy in accompanying Gladsen and

others in an attempt to rob the train * * * nor for the act of McCarthy in being present at the time and place of the fatal shooting, etc."

In the second place, the use of the words "employ" and "employment" in this instruction did not concede that McCarthy was an employee within the meaning of the Act. Neither did the use of such or similar words by the witnesses in referring to the engagement of McCarthy by the petitioner constitute evidence that McCarthy was an employee within the meaning of the Act. The use of the words "employ" and "employment" was proper in referring to the engagement of an independent contractor for both in common parlance and in legal nomenclature one is "employed" to perform an independent contract. An independent contractor is *employed* to render a particular service which he contracts to perform. He is employed or hired just as much as is a servant. In practically every text book defining an independent contractor the law writers use the verb "employ" in referring to his engagement or use the word "employer" when referring to the person engaging him for the particular service.

In 2 Thompson on Negligence, Sec. 22, p. 899, an independent contractor is defined as:

> "One who renders service in the course of an occupation representing the will of his *employer* as to the result of his work and not as to the means by which it is accomplished."

This definition of an independent contractor was adopted by the Supreme Court of Missouri in *Fink* v.

Furnace Co., 82 Mo. 276. It has been quoted with approval in practically every decision of that court dealing with similar questions up to the present time. One of the late decisions of that court is *Thomassen* v. *West St. L. Water & Light Co.*, 312 Mo. 150, where, at page 153, the definition by Judge Thompson is quoted with approval. On page 154, the author of the opinion quotes with approval the definition given by Sherman & Redfield on Negligence, wherein they refer to the one engaging the service of an independent contractor as the "employer." On page 155, it quotes with approval from Judge Cooley, in his work on Torts (2nd Ed.) top page 647, where he uses the verb "employ" with reference to the engagement of the independent contractor. Likewise, the opinion quotes from Wharton on Negligence, Section 181, an excerpt from *Painter* v. *Mayor of Pittsburgh*, 46 Pa. State 313, where Judge Sharswood said:

> "It may be considered as now settled that if a person *employs* others not as servants but as mechanics or contractors in an independent business * * * he incurs no liability for injuries resulting to others from their negligence or want of skill."

In *Lawhon* v. *St. Jos. Vet. Lab.*, 252 S. W. 44, 48, the Supreme Court of Missouri *en banc*, speaking through Judge Ragland, said, at page 48:

> "It is frequently difficult to determine whether an *employee* is a servant or an independent contractor, etc."

In 14 Ruling Case Law, p. 67, Sec. 3, the words "employed" and "employer" are used by the author in referring to an independent contractor thus:

> "The vital test in determining whether a person *employed* to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the *employer.*"

On page 38 of petitioner's Revised Brief will be seen a quotation from 2 Corpus Juris, Sec. 10, page 424, where the distinction between an agent and servant on the one hand, and an independent contractor on the other, is drawn. In this quotation the words "employer," "employed" and "employment" and even the word "employee" are used in connection with the engaging of the services of an independent contractor.

In 4 Words & Phrases (3rd Series) under the title "Independent Contractor, pages 222 to 235 inclusive, will be found many definitions of "independent contractor" aside from the statutory definitions in Workmen's Compensation Acts. In the bulk of these definitions as used by the various courts, it will be found that the courts make free use of the verb "employ" as referring to the engagement of an independent contractor and likewise use the word "employer" in referring to the person engaging his services. The same is true of the definitions under the title of "Independent Contractor" in the first and second series of Words & Phrases.

This court has made similar use of such terms. In *Standard Oil Co.* v. *Anderson,* 212 U. S. 215, the

court quoted with approval the words of Holmes, C. J. (later Mr. Justice Holmes), in *Driscoll* v. *Towle,* 181 Mass. 416, as follows:

> "Of course, in such cases the party who *employs the contractor* * * *. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make *the employer* liable under the fiction that the act of the *employee* is his act."

Similarly, in *Casement* v. *Brown,* 148 U. S. 615, this court, speaking through Mr. Justice Brewer said:

> "* * * They (Casement & Co.) did not agree to enter generally into the service of the companies and do whatsoever *their employers* called upon them to do but they contracted for only a specific work."

Hence, it is plain that the use by Mitchell, Boult and Barber in their testimony of such words as "employed" etc., does not constitute evidence that McCarthy was an employee within the meaning of the Act—when the *facts* as to what the engagement actually was clearly disclosed, at most, an independent contractor relation, and when Mitchell had expressly testified that he had not employed McCarthy "as a member of the department" (R. 15).

III.

David Did Not Know of Petitioner's Engagement With McCarthy.

On pages 21, 22 and 23 of Respondent's Revised Brief, it is asserted that the evidence justified a find-

ing that David knew of petitioner's engagement with McCarthy and "had a right to rely upon this method of giving advance information."

The only evidence on this subject was directly to the contrary, it being contained in the testimony of Chief Special Agent Mitchell (R. 11-33), Assistant Chief Special Agent Boult (R. 33-60), and Special Agent Barber, in charge of petitioner's Kansas City office and men (R. 192-201). The arrangements with McCarthy were made secretly by Mitchell and Boult (R. 17, 18). Barber, who employed David (R. 193, 194) testified (R. 199):

> "Q. State whether or not you advised the other special agents and train riders of the employment of Harry McCarthy?
>
> A. I didn't.
>
> Mr. Freet: We object to that unless it is shown it came to the knowledge of the deceased.
>
> The Court: He said he didn't.
>
> Q. You didn't advise anybody of the employment of Harry McCarthy?
>
> A. No, sir.
>
> Q. State the reason of that? Was it kept a secret or not?
>
> A. It wasn't calculated, on such cases—it wasn't calculated to come to the knowledge of anyone employed.
>
> Q. Outside of the head men?
>
> A. Outside of the heads who employed them."

Respondent's attempt (Resp. Rev. Br. 21), to establish that David knew of McCarthy's engagement (while wholly immaterial—see authorities our Revised Brief) because of the fact that McCarthy had on a

prior occasion advised Boult on 15th Street (R. 44), of the gang's intention to that night rob petitioner's train at Kenneth Tank, Kansas, and because Boult promptly sent armed men to Kenneth Tank, is unjustified. There was no evidence whatsoever that Boult imparted to David, or anyone else, the source of his information that a robbery at Kenneth Tank was contemplated that night. The implication from Mr. Boult's testimony (R. 45) is clear that he did not inform any of the train riders as to McCarthy's "tip" of the robbery—which in fact was not attempted (R. 46).

Respondent's contention that the foregoing facts prove that David had a right to and did rely upon and believe that he would receive advance information of any robbery attempted by this gang is so strained and unwarranted that further comment seems plainly unnecessary.

It is respectfully submitted that the judgment below should be reversed.

EDWARD J. WHITE,
THOMAS HACKNEY,
LESLIE A. WELCH,
Counsel for Petitioner.

FILE COPY

FILE
SEP 28
CHARLES ELMORE

No. 365.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HORACE GUFFIN,
of Kansas City, Mo.,
Counsel for Respondent.

EDMUND H. McVEY,
SAMUEL R. FREET,
LESTER G. SEACAT,
of Kansas City, Mo.,
Of Counsel.

INDEX

Statement 1

The Special Agent's Department 3

The Train Riders 3

The Bandit Gang 5

The Employment of McCarthy 6

McCarthy's Instructions About Reporting . . 8

The Protection Provided 9

The Planning of the Fatal Robbery 11

The Events of the Evening 12

Mr. David's Train 14

The Shooting of Mr. David 15

McCarthy's Reports 16

Summary of Brief in Opposition 19

Brief in Opposition to Petition 21

I. As to Jurisdiction 21

II. As to Assumption of Risk 21

III. As to Duty to Warn 28

IV. As to Decedent's Ignorance of Informant 32

V. As to Informant as Independent Contractor 34

VI. As to Opportunity to Communicate . . 36

VII. As to Failure of Proof 37

VIII. As to Speculation and Conjecture 37

Conclusion 37

CASES CITED

Atlantic Coast Line vs. Southwell, 275 U. S. 64, 48 Sup. Ct. Rep. 25 30
Baxter vs. Roberts, 44 Cal. 187, 13 Am. Rept. 160 30
Chesapeake & Ohio Railway Co. vs. De Atley, 241 U. S. 310, 36 Sup. Ct. Rep. 564 22
Chesapeake & Ohio Ry. Co. vs. Proffitt, 211 U. S. 462, 36 Sup. Ct. Rep. 620 (2) 23, 32
Chicago & Northwestern Ry. Co. vs. Bower, 241 U. S. 470, 36 Sup. Ct. Rep. 624 23
Chicago R. I. & P. Ry. Co. vs. Ward, 252 U. S. 18, 40 Sup. Ct. Rep. 275 23
Cincinnati N. O. & T. P. Ry. Co. vs. Hall, 243 Fed. 76, 80, 81, 82 (2) 25, 29
Co-operant Tel. Co. vs. St. Clair, (C. C. A. 2nd Cir. 1909) 168 Fed. 645 ..... 25, 29
Feaster vs. Southern Ry. Co., 15 Fed. (2d) 540 31
Gila Valley C. & N. R. Co. vs. Hall, 232 U. S. 94, 34 Sup. Ct. Rep. 229 23
Great Northern Railway Co. vs. Knapp, 240 U. S. 464, 36 Sup. Ct. Rep. 399 ..... 2, 34
Holzhauser vs. March, 18 Colo. App. 431, 72 Pac. 289 30
Lowry vs. Atlantic Joint Terminals, 145 Ga. 782, 89 S. E. 832 31
Manwell vs. Durst Bros., 178 Cal. 752, 174 Pac. 881 31
M'Calman vs. Illinois Cent. Ry. Co., (C. C. A. 6th Cir.) 215 Fed. 465 ..... 24, 29
Pantzer vs. Mining Co., 99 N. Y. 368, 376 22
Perry vs. Marsh, 25 Ala. 659 30
Peters vs. George, (C. C. A. 3d Cir.) 154 Fed. 634 ..... 23, 29
Reed vs. Director Gen'l of Rlds., 258 U. S. 92; 42 Sup. Ct. Rep. 191 23

St. L. & San F. Rd. Co. vs. Mills, 271 U. S. 344; 46 Sup. Ct. Rep. 520 ..... 20, 30, 32

Toledo & St. L. & W. R. Co. vs. Allen, 276 U. S. 165; 48 Sup. Ct. Rep. 215 26

Wall vs. Chesapeake & O. Ry. Co., 256 U. S. 125; 41 Sup. Ct. Rep. 402 35

Willoughby vs. Chicago, 235 U. S. 45, 35 Sup. Ct. Rep. 23 35

TEXT BOOKS CITED

7 Am. & Eng. Enc. of Law (2d Ed.), 417 and cases cited 33

3 Labatt's Master & Servant, (2d Ed.) Sec. 894 21

Labatt, Sec. 1178 22

RULES CITED

Rule 38, Sec. 5, Sub-Div. (a) 1

No. 365.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The petition in this case, construed in the light of this court's rules and the nature of certiorari asserts in effect that the Supreme Court of Missouri has decided a case under the Federal Employers' Liability Act (U. S. C. Title 45, Sec. 51) in a way probably not in accord with applicable decisions of this court (Sub. (a) Sec. 5, Rule 38).

In its petition and the statement of its reasons for the allowance of the Writ (Pet. 23) Petitioner has limited the scope of its complaint here to the question as to the sufficiency of the evidence principally with respect to the application in this case of the doctrine of assumption of risk. Applying the rule announced in *Great Northern Railway Co.* v. *Knapp,* 240 U. S. 464, the case then is one which merely involves an appreciation of all the facts and admissible inferences for the purpose of determining whether there were matters for the consideration of the jury. The test upon this question is whether the error of the Missouri court is palpable.

In order to correct inaccuracies and omissions in Petitioner's statement the respondent deems it necessary to make a brief statement of the facts shown by the record.

(Page references are to the Transcript of the Record.)

James Lee David was employed, about April 1, 1923, by the Missouri Pacific as a train rider, at a salary of $135.00 a month and expenses. It was admitted that at the time of his death he was engaged in interstate commerce (11). He was the husband of the widow-administratrix, Sophia David, the plaintiff in this case. They had been married twenty-two years at the time he was killed, and were the parents of two children, aged eighteen and nineteen respectively. At the time of the trial she was still a widow and was operating a power machine for the Kansas City Garment Co. (171-173).

The Special Agent's Department.

In the company's organization the work of protecting property owned by and in the company's care, was in a special department, under a chief special agent, located at St. Louis. Directly under him were two assistant chief special agents, one located at Kansas City, Mo., and the other at Little Rock, Ark., between whom the company's territory was divided. Under the two assistants there were in all sixteen divisional special agents, each of whom had direct charge of the work on his division. Within each division there was a further detailed organization of lesser ranking personnel.

R. S. Mitchell of St. Louis was chief special agent. W. H. Boult of Kansas City was assistant chief special agent, assigned to the western lines (12-14). C. M. Barber was divisional special agent at Kansas City (192).

The Train Riders.

The train riders in the railway service were part of this department (23). They were under the jurisdiction of the divisional special agent, by whom they were assigned to the trains of the company, not on regular runs, but as and where needed (24). It was their duty to examine the seals on the car doors and see that they were intact, and that the train was all right, both before departure and en route (35). In a general way they were to protect the trains (23). For this purpose they were provided with flashlights (190).

There was no fixed rule about the number that would be assigned to a given train. That was a matter within the discretion of the local man. If men were available more than one rider would be sent with a train.

> *"If the local man thought it necessary for some reason he might send more than one"* (p. 24).

Nor was there any fixed rule about where they would ride on a train. That was left to the rider's judgment (35). On the occasion in question, for example, there were two train riders, the deceased and one Boyd. When Mr. David boarded the train he road in the caboose. At the first stop, he went on up through the train to the engine and there rode into Leavenworth, Kansas (188).

Mr. Boult, the assistant chief special agent at Kansas City, testified:

> "Q. Were any train riders instructed to go armed?
>
> "A. We never instructed them at all, they was to protect the train.
>
> "Q. You knew, did you not, as to whether or not they were going armed, or whether they were going unarmed?
>
> "A. Apparently did.
>
> "Q. Well, didn't you give them any instructions in that respect?
>
> "A. We never gave them any instructions not to go armed.
>
> "Q. Well, did you ever give them any instructions to go armed?
>
> "A. I don't know that I ever did.

"Q. When they went armed who provided them with guns, pistols or firearms?

"A. They had them themselves. We didn't, the Missouri Pacific didn't (36).

* * * * * * * *

"A. Instructions had been issued to all train riders on account of having so many robberies, to be on the lookout for robberies and be able to protect themselves, *by all means, not to get hurt, if they could prevent it*" (59).

Mr. L. Q. Moore, a night sergeant under the special agent at Kansas City (193), and the man who assigned Mr. David and Mr. Boyd to the fatal ride, described one of the serious complications in this case in this way:

"Q. Now, Mr. Moore, have you also served as train rider?

"A. Yes, sir; I have ridden a few trains—not very much.

"Q. As a matter of fact, there are frequently tramps found riding trains, aren't there?

"A. Yes, sir.

"Q. Men who are just bumming rides from different points to different points, aren't there?

"A. Yes; that is true.

"Q. And men who are not attempting to resort to robbery or crime of any kind—just trying to get a lift from one town to another? That is true, isn't it?

"A. *Well, you can't tell what a fellow is doing when he is riding a train*" (186).

The Bandit Gang.

For some time before Mr. David was employed, the company had been annoyed by an organized gang of thieves in and about Kansas City (16). Among

some dozen members of the gang, Bert Gladson, Lawrence Hayes, Nathan (Red) Loar and Hogy Ward were identified as participants (40). They were bad men, described by Mr. Boult as being:

> "The biggest bunch of thieves, and bank robbers and murderers (including) the man who had formerly shot our special agent, Fred Conklin, at Osawatomie" (56).

The divisional special agent, Mr. Barber, and Mr. Moore, the night sergeant, both said that this gang would shoot on sight (194, 183). Lawrence Hayes, one of the gang, testified that loaded guns were carried and that they were for use when occasion required; that the gang would shoot its way out of trouble, if trouble confronted it (163).

Naturally the gang diversified its activities and shifted its attack. "They don't rob any particular run, at different parts of the road" (Boult, 39). Robberies were mentioned at Leavenworth, Atchison, Stillwell, Osawatomie and Paola, in Kansas, and at Pleasant Hill and Raytown, Missouri (39-42). These affairs did not happen every night. "We were being robbed every week around Kansas City at this time" (26). At the time he was employed Mr. David was informed of this situation and told to be careful and watch out for himself (183, 194).

The Employment of McCarthy.

Mr. Mitchell, the chief special agent, became very much concerned about the company's losses from this source and resorted to the familiar and common

weapon of espionage (16-201). Through the Union Pacific's chief special agent, Mr. Mitchell and one Harry McCarthy were brought together in the Baltimore Hotel at Kansas City. Their meeting was characterized by Mr. Mitchell as a "hotel transaction." McCarthy was known as an all around "bad actor." He and Mr. Mitchell talked alone for three hours. McCarthy told him his history, "as I recollect it, his whole life had been a life of crime" (Mitchell 17-20).

Of McCarthy's employment, Mr. Mitchell testified:

> "I talked with McCarthy probably two or three hours, at which time he told me the history of the robberies committed by this gang; he told me at that time who was acting as head of the gang, who was furnishing the brains for these thieves, and he told me a great many details in connection with these robberies; he told me that he was trailing with the gang and he wanted to get away from them. *I arranged with him to keep us informed as to the activities of this gang, to give us advance information, if possible, when this gang planned to rob our trains,* and further arranged with him, in the event he could not get to us, couldn't give us advance information, to give us information then as to the fence where the stuff was taken, as well as to who was in the robbery, and all the details possible. Now, after I had satisfied myself that McCarthy knew what he was talking about, *and I believed he could do what he contracted to do,* I arranged with him to pay him one hundred and fifty dollars a month for that sort of service, and then I called in my assistant, Mr. W. H. Boult, and I introduced Boult to McCarthy, and arranged with McCarthy his way of reporting to Mr. Boult, and left the matter in Mr. Boult's hands." • • •

"Q. He knew how to get hold of Mr. Boult?
"A. *Yes, night and day service.*
"Q. And where he could reach Mr. Boult at any time if he might want him?
"A. Yes, sir.
"Q. Did you know who the thieves were with whom he was supposed to be associating?
"A. He told me all of their names at that time.
"Q. Who were they?
"A. I don't remember all of them; one was named Loar, one was Gadsden—

"By Mr. Hackney: I think it is Gladsten; Hayes.

"By the Witness: Yes, Hayes; Loar, Gladsten; I don't know; there was a dozen of them" (17-18).

"Q. The substance of your three hours' conversation amounts to this, then: That he was to continue to trail with these thieves, with whom he was acquainted, and was associating, to acquire any information he could possibly get about any anticipated robberies they were going to pull off, and to immediately inform you of those things?
"A. Yes" (32).

McCarthy's Instructions About Reporting.

Mr. Boult, the assistant chief special agent, was thoroughly conversant with this arrangement.

"Q. Now, when he was employed what instructions did you give him in respect to what he was to do?
"A. Well, we couldn't very well give him instructions, he was a man to furnish us with information where those robberies were committed, who was committing them and if he could get to us in time to tell us before the robbery was committed, if not, to tell us what had become of the goods.

"Q. Well, what was the plan and arrangement in respect to whether or not he was to go with this gang on their robberies, robbing expeditions?

"A. He was to continue the same as he did to get information, that is generally up to the man's own idea that is working.

"Q. Well, do you mean the plan was that he was to continue with this gang, Gladston, Loar, Hays and others?

"A. *His instructions were that he was to get us word before the robbery was committed, if he could, if not, to give us information as soon as he could after the robbery had been committed.*

"Q. Who was he to report this information to?

"A. Myself.

"Q. Did you advise him as to how to reach you *any time through the night or day?*

"A. *Through the telephone*" (41).

The Protection Provided.

The purpose of these reports was obvious. Mr. Mitchell testified:

"Q. You say he was to make his reports to Mr. Boult?

"A. Yes, sir.

"Q. Or to someone that Mr. Boult might designate?

"A. That is it; I left him in Mr. Boult's lap.

"Q. That was to enable you to fortify yourselves against the expected robbery?

"A. Yes, that was to enable us to catch these thieves.

"Q. You expected, whenever you got notice from McCarthy that anything like that was to take place, to detail additional men on the train at that time, or wherever the robbery was to occur?

"A. No, it was taken care of in various ways; that was one of the ways.
"Q. What were other ways?
"A. Take an automobile and go out and intercept them" (22).

Mr. Boult graphically described what took place on one occasion when McCarthy reported an impending robbery. About *five o'clock* one evening McCarthy reported in person to Mr. Boult, in Kansas City, Missouri, that the gang was going to rob a train at Kenneth Tank in Kansas (according to the map, this is about twenty-five miles out of Kansas City).

"We immediately went there with the men to cover that place. * * * We immediately got our men, got help from Paola and covered this point all night.
"Q. *Did you also notify the train riders on these respective trains to be on the lookout.*
"A. *Yes, sir.*
"Q. Did you put on any extra train riders?
"A. That night we didn't. We didn't have them.
"Q. But you warned them all?
"A. *We warned them all.*
"Q. And in addition to that you had police officers covering the place where the robbery was expected to take place?
"A. Not that night" (44-45).

Plans somehow miscarried and the robbers never left Kansas City, Kansas (46).

McCarthy, from the time of his employment until the time Mr. David was killed made other reports to Mr. Boult from time to time, not regularly, but apparently they were in touch with each other all of the time (43). Mr. Boult's best recollection was that Mc-

Carthy might have called him as late as the day before Mr. David was killed (48).

The Planning of the Fatal Robbery.

On May 16th, 1923, Hogy Ward, one of the gang, was being tried in the District Court of Wyandotte County, Kansas, for a payroll holdup. Certain of his confederates were in attendance as spectators. This group included Bert Gladsen, Lawrence Hayes, George Riley and others, and the stoolpigeon McCarthy (62-118).

Out in front of the court house during the noon hour they (including McCarthy) had a conversation about robbing box cars of the Missouri Pacific at Leavenworth that night. "We had intention of coming up and robbing box cars that night," and the plan was agreed upon (63-64).

> "Q. To rob any particular train?
> "A. Why, most generally they get the best merchandise there, about one-thirty in the morning" (76).

This was a train that carried cigarettes mostly and they were interested in cigaretes. It stopped at Leavenworth and it was at Leavenworth that they expected the robbery to take place (66-118). *They had robbed this particular train at the same place several times before* (128).

They discussed the expedition at different times, practically all afternoon. Lawrence Hayes testified that he first heard of it somewhere around two o'clock (118-119). They decided that right after the trial

adjourned they would meet down at Riley's house, when and where they would make their arrangements, "try to get two cars to come up, some of the boys didn't want to come up" (Gladsen 63).

After court had adjourned that evening they all went down to Riley's house on South Coy Street in Armourdale, in Kansas City, Kansas. There they consulted, and Gladsen, Hayes, McCarthy and one Charles Masterson agreed to go. This was about six-thirty in the evening (66-67).

Mrs. Ada Riley, mother of George Riley, testified to this meeting. It occurred, she said, along in the evening, near supper time. She understood that Missouri Pacific box cars were their objective and Leavenworth the chosen place (170-171).

The Events of the Evening.

They left Riley's house about six-thirty or a quarter of seven and went to a restaurant to eat (121). Then McCarthy, Hayes and Masterson drove to the Federal Reserve Life Insurance Building, at Seventh and Armstrong in Kansas City, Kansas (a block south of Minnesota Avenue, the principal business street), where Masterson wanted to see a doctor. They stopped in front of the building somewhere near eight o'clock. McCarthy and Masterson got out, Hayes waited in the car. Masterson went up to the doctor's office and McCarthy went *alone* to a drug store on the northeast corner of Seventh and Minnesota one block and a wide street north of Hayes and the car (122-123).

Masterson came back from the doctor's office in five or six minutes, got in the car, sat down, lit a cigarette and announced that the doctor was out and that he was going to wait. Hayes then proposed that they go down to the drug store and get something to drink. They turned around, drove to Minnesota Avenue, parked the car, locked it, went over to the drug store and joined McCarthy (122-123). Hayes estimated that from the time McCarthy left the car in front of the doctor's office until they rejoined him there, some seven or eight minutes elapsed. McCarthy was just looking around when they got there (124).

The three of them had a drink together and then Masterson went back to the doctor's office. McCarthy and Hayes drove to the foot of Minnesota Avenue (at Second Street) and watched a Missouri Pacific freight train go by (Hayes, 125). After that they drove back to Tenth and Minnesota, south on Tenth to Central Avenue, where they picked up Gladsen (125-126).

Wanting a fourth member of the party, they then drove to Nathan (Red) Loar's home, on South Fifth Street, in Armourdale. All the lights were out and McCarthy got out of the car, alone, went up on the porch and asked for Loar (68). Loar had been in bed and it took him ten or fifteen minutes to dress and come to the car (126).

They then drove to Ferry and Osage where McCarthy's sister lived, and McCarthy again got out of the car alone and went to the front porch to get

some overalls and a jumper. This house sat back on an alley. They stopped the car on the street. McCarthy's errand that time took him some 60 yards away from his confederates (126, 127).

Then they drove to Gladsen's home, at 833 South 13th Street, where they picked up two guns and an iron bar to open box car doors with (127).

They then drove straight to Leavenworth (68). They left Kansas City, Kansas, somewhere around ten o'clock and got to Leavenworth about eleven fifteen or twenty—a drive of a little over an hour. They stopped at an old sugar refinery on a little creek bridge about a half a block from the Missouri Pacific tracks, and waited for the train (128). "Oh, we must have waited about an hour or an hour and a half" (Gladsen, 69).

Mr. David's Train.

In the meantime, Train No. 173, a freight, was made up in the yards in the East Bottoms of Kansas City, Missouri. Its cargo was destined for points in Kansas and elsewhere (187, 38). It left Kansas City about ten o'clock (128).

On the night of May 16th, 1923, the train consisted of fifty-five or sixty cars. Mr. David probably boarded it at the A. C. Junction, (near the Missouri-Kansas line on the west side of Kansas City, Mo.). He rode the caboose from Kansas City, Missouri, to Wolcott, Kansas, the first stop. There he left the caboose and went up through the train to the head end, and rode on the engine into South Leavenworth.

The other train rider, Boyd, rode the caboose from Wolcott into Leavenworth. At South Leavenworth they took a siding to clear the track for a passenger train and stopped (188-189).

The Shooting of Mr. David.

When the train whistled at Leavenworth, McCarthy and Gladsen got out of the waiting bandit car and Hayes and Loar left. It was the plan that the former would break into the cars at South Leavenworth, get the stuff ready and throw it out at a particular crossing previously agreed upon in the north end of town, where the other two with the car would meet their confederates and return with the loot to Kansas City (129).

McCarthy and Gladsen went over to the railroad track, hopped the train and rode on down in the yards to the place where the train stopped. They were both armed and McCarthy had the pinch-bar, the breaking tool (69-70).

The train had been on the passing track probably ten minutes when the fatal shooting occurred. Mr. Dougherty, the train conductor, and Mr. Boyd, the other night rider, left the caboose and proceeded forward between the main line and the passing track. Boyd was behind Dougherty. When they reached a point twenty-five to thirty car lengths from the engine, he heard two shots "pretty close together," fired about four or five car lengths ahead of where they were. Boyd then commenced shooting. Dougherty went to Mr. David and found him lying on the ground dead.

He testified, "it appeared he was shot (in the chest somewhere) from someone standing up and ranged downward" (191). Mr. David fell between twenty and twenty-five cars lengths from the engine, where he had been when the train stopped, and on the same side of the train where Dougherty and Boyd were walking. Mr. Dougherty did not see Mr. David when he was shot, did not see the shooting and saw no gun-flashes. Mr. David had a revolver and sawed-off shot gun on him at that time (186-192).

The first information Mr. Boult had about the affair came to him after the killing. His night sergeant called him at his home in Kansas City, and he, the sergeant and two special agents drove to Leavenworth that night (50).

McCarthy's Reports.

The first report Boult had from McCarthy he received between seven and eight o'clock the next morning when one of his officers called Mr. Boult at Leavenworth on the telephone from Mr. Boult's office in Kansas City. McCarthy was at the office at the time and talked with Mr. Boult over the telephone. Later Boult talked with him in person. McCarthy gave him "all the information on who killed David, how it happened, and he went to Leavenworth with me to make the report to the county attorney" (Boult 52).

The defendant developed on the cross examination of Lawrence Hayes that McCarthy testified in the trial of Bert Gladsen for the murder of Mr. David, where he was convicted and given a life sen-

tence, and that McCarthy there testified that Gladsen was the man who shot David (140). Mr. Mitchell also testified:

> "Q. So after the killing of David, then McCarthy assisted in convicting these men that were responsible for Mr. David's death?
> "A. Testified against them, yes, sir.
> "Q. They were on trial over there in the Kansas court and Gladsen is the man shown to have shot David?
> "A. Was convicted of shooting David.
> "Q. And is serving a life sentence now?
> "A. And is serving a life sentence now.
> "Q. At Lansing, Kansas?
> "A. Yes, sir.
> By Mr. Hackney: That is all" (30).

McCarthy was continued in the service for some time. After he had testified, they got him a laborer's job in the roundhouse or shops, and "I (Mr. Mitchell) kept him employed for some time. * * * My instruction to Boult was to help McCarthy." Finally he left of his own accord (28-29). When the conviction for robbing Missouri Pacific box cars, which was pending in the Supreme Court of Kansas, on appeal at the time, was affirmed, he was paroled, Mr. Boult thought, by the judge from the bench. He thought McCarthy deserved some credit for helping to get rid of Gladsen and Loar, and was interested in his parole. He denied that he had spoken to the judge directly or signed an application. "I may have said I would like to see him paroled" (56).

McCarthy, however, did not testify at this trial.

To get back: McCarthy made no report to Mr. Boult or anyone else to Boult's knowledge about the fatal robbery (49) after it was planned at noon the day before it occurred (63-64), and the time Mr. David was shot down by Gladsen in the railroad yards at Leavenworth.

"Q. Had any warning or information been given David or Boyd of this particular intended robbery at Leavenworth, Kansas?

"A. The night David was killed?

"Q. The night David was killed.

"A. *I had no information that there was going to be one and there was no reason why we should give them one that night.*

"Q So, you didn't give—

"A. (interrupting) They had general instructions at all times.

"Q. I say, so you didn't give them any particular instructions that night?

"A. I didn't have any information" (Boult, 59).

SUMMARY OF BRIEF IN OPPOSITION.

I. Respondent is not raising any question about jurisdiction.

II. The Missouri Supreme Court held that decedent did not assume the risk of the extraordinary danger to which he was exposed, growing out of the petitioner's failure to fulfil its primary and non-delegable duty to warn him of an imminent and deadly danger known to it and unknown to him. Petitioner is relying upon the doctrine of common and ordinary risks equally known to employer and employee, and ignores the doctrine of extraordinary risk which was applied by the Missouri Court. Hence, the petitioner makes no showing under this point for the granting of writ in this case.

III. The Missouri Supreme Court held, consistently with plain doctrines of general acceptance in the National courts and elsewhere that the petitioner was in duty bound to warn the decedent of the imminent and deadly peril to which he was exposed which was unknown to him and known to it. Here again petitioner is relying upon decisions which are distinguishable and not in point because they do not concern situations involving the disparity of knowledge which existed here. Hence no reason is advanced under this point for allowing the writ.

IV. Petitioner's complaint that the Missouri Court's decision, that the decedent had a right to rely

upon the petitioner's secret agent whose employment and presence in the system was unknown to decedent, is contrary to this court's decision in *St. L. & S. F. Rd. Co.* v. *Mills, infra,* is without merit because in that case complaint was made of a deficiency in a gratuitous service, whereas here complaint is made of a specific failure to function of a method of work selected by the petitioner and liability is predicated upon a default in the performance of an elemental non-delegable duty to warn. Hence the *Mills* case constitutes no basis for certiorari here.

V. Petitioner's contention that the rule of *respondeat superior* does not apply because the informant McCarthy was an independent contractor has no force on its merits and has no place here because not raised at the trial or in the Supreme Court of Missouri except upon the petition for rehearing which was overruled without opinion.

VI. The petitioner's *alter ego,* the stool pigeon, knew of the time and place of the intended robbery at noon of the day before it occurred at one-thirty in the morning. He was instructed how to communicate with his superiors by phone day or night, and was not suspected by his confederates. Hence, the finding of the jury that McCarthy could have communicated with his superiors had ample support in the evidence.

VII. The contention that there was an absence of proof of proximate cause is groundless.

VIII. The jury was not left to conjecture, speculation or guess.

BRIEF IN OPPOSITION TO PETITION.

(Following Petitioner's Order of Argument.)

I.

Respondent Is Not Raising Any Question About Jurisdiction.

II.

The Supreme Court of Missouri Recognized and Applied the Law of Assumption of Risk in Strict Accordance With the Decisions and Declarations of This and Other Federal Courts.

The Supreme Court of Missouri quoted petitioner's contention in this connection as made before it (See Rec. 228-229) and answered it in this language:

> "Assumption of risk arises out of the contract of employment, the obligations of which are mutual. The servant on the one hand impliedly agrees to assume the risk of all dangers and perils ordinarily incident to the work undertaken by him; the master on the other hand impliedly contracts that he will at all times do whatever may be needful to minimize or obviate such risks, in so far as the same may be done by the exercise of ordinary care. It is axiomatic that, *prima facie*, a servant does not assume any risks which may be obviated by the exercise of reasonable care on the master's part (3 Labatt's Master and Servant) (2d. Ed. Sec. 894).
>
> 'One, and perhaps the most important, of those exceptions (to the doctrine of assumption of risk), arises from the obligation

> of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require* * * (*Hough* v. *Railroad,* 100 U. S. 213, 217).
>
> 'It is those risks alone which can not be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes.' (*Pantzar* v. *Mining Co.,* 99 N. Y. 368, 376; see also Labatt, *supra,* Sec. 1178 and cases cited in the notes.)

"Although David knew, appreciated and assumed the dangers incident to his employment, it was, notwithstanding, the continuing duty of his employer to exercise ordinary care to minimize or obviate them. That a timely warning to David, giving him the information which appellant had acquired in advance of the intended robbery, subsequently attempted, would have greatly minimized, if not obviated, its perils to him, is so obvious as to require no elaboration. In its failure to give such warning, appellant was derelict in the discharge of a duty both moral and legal."

While the court below was content (and properly so) to rest its decision in this respect upon the language of *Mr. Justice* Harlan in *Hough* v. *Railway Co.,* 100 U. S. 213, 217, the decision and declaration of law it here makes is identical in substance with repeated declarations of this court, in cases under the Federal Employers Liability Act.

Chesapeake & Ohio Railway Co. v. *De Atley,* 241 U. S. 310, 36 Sup. Ct. Rep. 564.

Chicago & Northwestern Ry. Co. v. *Bower,* 241 U. S. 470, 36 Sup. Ct. Rep. 624.
Chesapeake & Ohio Ry. Co. v. *Proffitt,* 241 U. S. 462, 36 Sup. Ct. Rep. 620.
Gila Valley C. & N. R. Co. v. *Hall,* 232 U. S. 94, 34 Sup. Ct. Rep. 229.
Chicago R. I. & P. Ry. Co. v. *Ward,* 252 U. S. 18, 40 Sup. Ct. Rep. 275.
Reed v. *Director Gen'l of Rlds.,* 258 U. S. 92, 42 Sup. Ct. Rep. 191.

The measure of petitioner's elemental duty to warn its employee of extraordinary dangers known to it and unknown to him was aptly stated by Circuit Judge Gray in *Peters* v. *George,* (C. C. A. 3d C.) 154 Fed. 634.

> "The question is always, whether the negligence charged is the neglect of a primary and absolute duty of the master to the servant. If such be its character, no delegation of the performance of that duty to another, no matter how inferior his rank may be in the master's service, can, as we have already said, relieve the liability of the master for its neglect. The master does not insure the safety of the servant, but he does undertake that the place in which he works, and the appliances with which he works, and the conditions under which he works, shall be reasonably safeguarded. A dereliction of the humblest employe in the master's service, to whom any part of such duty has been delegated, is the dereliction of the master. Therefore, in the language of the opinion just referred to, it will be seen that the question turns rather on the character of the act than on the relation of the employes to each other. It has never been doubted that a master's duty to an ignorant or inexperienced workman, *indeed to any workman about to undertake more than*

ordinarily dangerous work, is to explain its dangerous character and give adequate caution as to its prosecution. This duty is of the absolute, personal character above referred to, and is not discharged by merely intrusting its performance to a properly selected subordinate. Nothing short of actual notice of the danger to the workman who is to encounter it, with such cautionary explanation as may enable him to avoid it, wil satisfy the requirement of the law, and the default of the intermediary, whether he be the highest officer in control, or merely a fellow workman of the one exposed to the danger, is the default of the master. • • •

"Reasonably efficient supervision of work of the dangerous kind here described, must be held to be one of the primary and personal duties of the master."

The case of *McCalman* v. *Illinois Central R. R. Co.*, (C. C. A. 6th Cir.) 215 Fed. 465, involved injuries received by a railway guard during a strike in a pistol battle with a party of United States marshals, when the latter were mistaken for strikers and fired upon by a group of guards of which McCalman was a member.

"It is a general rule as respects any hazardous occupation that the master shall inform his servants of all perils to which they will be exposed, *which are* or should reasonably be known to him, except such as are obvious to the servants or through the exercise of ordinary care on their part may be foreseen and in either event injury therefrom reasonably avoided" (citing cases).

"And the duty so imposed upon the master is of a primary character and is therefore non-delegable."

> "The chief danger rationally to be apprehended lurked in the telephone message, 'There was trouble at Nonconnah,' and the deputies approached the crossing with that belief. The nature of the danger, if under all the circumstances it was one reasonably to be anticipated, did not lessen defendants' duty to McCalman; for *knowledge of these new conditions would have enabled him to decide whether to remain at the crossing or discontinue his service.*"

In the case of *Co-operant Telephone Company* v. *St. Clair,* (C. C. A. 2nd C. 1909) 168 Fed. 645, a lineman was electrocuted when he came in contact with some live wires, which he did not, but his employer did, know were carrying current. The court said:

> "Well settled principles of law determine the conclusion. It is the duty of the master to use reasonable care in securing the employee a reasonably safe place to work, *and to be reasonably careful in warning the servant of any special and particular dangers incident to some particular locality about which the master is advised or should be advised, if he has been reasonably careful;* that precise definition of the word 'reasonable,' varying, of course, with the circumstances of each particular case."

Or as succinctly defined by the court in *Cincinnati N. O. & T. P. Ry. Co.* v. *Hall,* 243 Fed. 82:

> "The employer's duty requires information to his employee of all perils which should be reasonably known to the employer, *and of any change which introduces a new element of danger.*"

(And see text and cases cited in *Hall* case *id.* 80 and 81 and notes.)

Petitioner's exception to the declaration of the Missouri Court that there was a continuing duty of the master to minimize or obviate the danger to which David was known to be exposed, is therefore not well taken. Knowing that the danger (which petitioner's argument expressly concedes was deadly) was imminent, the petitioner was in duty bound to minimize or obviate it by giving David timely warning, and David, in the absence of such warning, was entitled to assume that he knew as much about his situation as did the petitioners, and to act accordingly.

The case of *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 48 Sup. Ct. Rep. 215, cited and quoted from by the petitioner states this distinction clearly in this language:

> "The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant. * * *
>
> "And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning."

In this case the decedent's knowledge of the situation and the imminent and present dangers existing because of the presence upon the train of armed and

desperate men was not equal to that *actually possessed* by the defendant. There is no contention that the decedent had any knowledge of this imminent peril or that the immediate presence of these desperados created an unusual hazard different from the common and ordinary risk of the employment. Instead of there being an absence of proof that he was exposed to some unusual danger by reason of a change in the situation, it is conceded that he was at that time exposed to that very danger which resulted in his death. Therefore, under the converse of the doctrine announced in the *Allen* case, it must be held that defendant was in duty bound to give him warning and that David cannot be held to have assumed the risk known to the petitioner about which he was not warned.

An examination of the cases cited by petitioner under Section II of its brief in support of its petition (Br. p. 26) shows that they all do no more than announce and apply the rule stated by the Missouri Court in the opinion in this case that the servant agrees to assume the risk of all dangers and perils ordinarily incident to the work undertaken by him. Each one of those cases stresses the fact that there was an absolute parity of knowledge of the risks and dangers between the employee and employer. Not one of them deals with a situation such as existed here where there was a clear disparity of knowledge between them—where an extraordinary danger was known to the employer and unknown to the employee, a situation controlled by the *DeAtley* case and its companion cases cited above.

Therefore, rather than there being any cause to believe that the Supreme Court of Missouri has committed palpable error by deciding the case at bar not in accordance with the applicable decisions of this court, the decision of the Supreme Court of Missouri is strictly in accordance with the decisions of this court. In this decision, the Supreme Court of Missouri fully recognized and applied the common law doctrine of assumption of risk as declared by this and other Federal Courts, in cases arising under the Federal Employers Liability Act and otherwise.

III.

David Was Entitled to Special Warning of the Impending Attack of the Desperados Upon His Train.

Petitioner argues that the inherent nature of Mr. David's work was sufficient warning to him of the danger which caused his death. The Supreme Court of Missouri answered this argument in the following language:

> "Appellant argues that as David had been warned specifically and fully with regard to the activities of the gang of thieves, of their dangerous character and of the likelihood of their attempting to shoot and kill him in case he came in contact with them, it can not be reasonably inferred that he would have been any more alert or would have taken any greater precaution for his own safety, on the occasion of the attempted robbery at Leavenworth, had he been forewarned with respect to it. The argument overlooks the fact that the dangers generally incident to David's work, like those of any policeman who walks a beat at night,

were merely contingent and in a sense remote. Foreknowledge that a specific danger will arise at a definite time and place will bring about quite a different reaction on the part of a policeman or any other. In addition to quickening the perception of the danger, such knowledge makes possible the adoption of adequate measures to meet or avoid it. From the characteristics of the thieves and their methods of operating, it is quite clear that they never courted an open battle with train guards; they merely shot their way out of trouble. If David had known of their presence when he left the engine cab, he would also have known that it was not only possible, but highly probable, that some of them were lurking between the box cars. With that knowledge it is inconceivable that he would have exposed himself to the particular peril which cost him his life. To say that he might have been killed anyway, even if he had been forewarned that the thieves would be there and had consequently followed a different course for the purpose of warding them off and protecting the company's property, is to leave the evidence for an excursion into the field of conjecture. From the evidence it may be justly inferred that David's death resulted from appellant's failure to warn" (Rec. 233-234).

The duty to warn under these circumstances is amply sustained in the cases heretofore cited:

Peters v. *George*, (C. C. A. 3rd Circuit) 154 Fed. 634.

McCalman v. *Illinois Central Rd. Co.*, (C. C. A. 6th Cir.) 215 Fed. 645.

Cooperative Telephone Co. v. *St. Clair*, (C. C. A. 2d Cir.) 168 Fed. 645.

Cincinnati N. O. & T. P. Ry. v. *Hall*, 243 Fed. 76.

See also—

Baxter v. *Roberts,* 44 Cal. 187.
Holzhouser v. *Denver Elec. Co.,* 18 Col. App. 431, 72 Pac. 289.
Perry v. *Marsh,* 25 Ala. 659.

None of the cases cited by petitioner under Section III of its brief (Pet. & Br. p. 31) is in point. The case of *St. Louis & San Francisco Ry. Co.* v. *Mills,* 271 U. S. 344, 46 Sup. Ct. Rep. 520 is distinguishable upon the ground that there was no disparity of knowledge between the decedent and the company. Indeed, in that case there was no knowledge whatever except of the general danger. A loyal car inspector during a strike was being accompanied home by a special agent. Without warning they were attacked by strikers and had no opportunity to defend themselves. This case certainly does not hold or was ever intended to be construed as holding that if the company had known of the time and place of the attack, and had failed to warn its employe of his hazard, no liability would have attached to it for that failure. *Atlantic Coast Line* v. *Southwell,* 275 U. S. 64, 48 Sup. Ct. 25, is similarly irrelevant here. It involved a wilful murder in a personal altercation, which it was asserted the general yard master, who was present, might have prevented had he foreseen the fatal consequences. This Mr. Justice Holmes said was unreasonable to expect of him under the circumstances. In that case the yard master was in the position of an innocent bystander. In this case the servant whose default is complained of, was that servant who was expressly commissioned to ob-

serve, and duty bound to report, the very fact which lead ultimately to Mr. David's death.

Feaster v. *Southern Ry. Co.*, 15 Fed. (2d) 540, was a case involving the death of a deputy sheriff hired as a guard over railroad property during the strike of 1922. From all that appears from the opinion, he was murdered by persons unknown before and after the fact. The court emphasized the fact that in those circumstances no care that the railroad company could have taken would have prevented the death. In the case at bar, Mr. David's murderers were known to the defendant before and after his death. Gladson, who killed him, was sentenced to life (the maximum of Kansas), on the testimony of McCarthy, who knew, during the noon hour of the day before the death, when and where the violence would occur. The Supreme Court of Missouri has very correctly said that had David had the benefit of the knowledge that McCarthy had had for those twelve hours, "it is inconceivable that he would have exposed himself to the particular peril which cost him his life."

The cases of *Lowry* v. *Atlantic Joint Terminals*, 145 Ga. 782, 89 S. E. 832, and *Manwell* v. *Durst Bros.*, 178 Cal. 752, 174 Pac. 881, are seen, upon examination, to be in the same category of irrelevancy.

There is no merit, therefore, in petitioner's contention that David was not entitled to special warning and certainly no showing made that the decision of the Supreme Court of Missouri in this particular is not in accord with any decision of this court.

IV.

It Was Immaterial That David Had No Knowledge of the Employment of McCarthy As An Informant.

Petitioner bottoms its argument in Section IV of its brief upon *St. Louis & San Francisco Rd. Co.* v. *Mills,* 271 U. S. 344, 46 Sup. Ct. Rep. 520. The difference between the two cases in this respect is marked. The Railway Company delegated one deputy sheriff to accompany the decedent in that case to his home during a strike. The opinion states that it was not contended that the company owed the employe any duty to guard him against violence by strikers. "Respondent here asserts that the defendant, having assumed to do something, should have done more," and that the claim of liability arose out of a deficiency in a gratuitous service.

Petitioner's contention in this respect is fully answered by the language of this Court in *Chesapeake & O. R. Co.* v. *Proffitt, supra,* that "the employe has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work)," and by the language of Circuit Judge Gray in *Peters* v. *George, supra,* that, "it has never been doubted that a master's duty * * * to any workman about to undertake more than ordinarily dangerous work is to explain its dangerous character and give adequate caution as to his protection." It is axiomatic that:

"'It is one of the legal duties of the master to give his servant warning of any extraneous and *unusual* danger to which he may be subjected; and if the master fails to use ordinary care to do so, and the servant is injured, the master is liable *because the injury did not flow from any risk assumed by the servant, but from the personal negligence of the master.* Nor can the master avoid liability by making it the duty of an agent to give such warning, and then, if it is not given, say that the negligence was that of a fellow servant. In such cases the maxim *qui facit per alium facit per se* applies as between the master and the servant entitled to the warning; and the servant or agent appointed to give the warning, no matter what his grade or rank in the general service of the master, becomes, or such purpose, the *alter ego* of the master. His act is the master's act; his failure the master's failure.'" (7 Am. & Eng. Enc. of Law (2d Ed.) 417, and cases cited.)

The resort by the Company to the age-old method of espionage by the employment of stool-pigeons in combating the harassing depredations of the Gladsen gang was no more than the establishment of a system or method of doing its work. By adopting it, petitioner itself selected its own standard of care. The employment of McCarthy, therefore, was not a voluntary act as was the delegation of the special agent to guard the employe in the *Mills* case. Nor would the warning that would have been given Mr. David, had McCarthy, with ample time and opportunity to do so, obeyed the command of his superiors and reported this information he had acquired in the discharge of his duty been a gratuitous service. McCarthy was the *alter ego* of the Company in the discharge of its non-delegable personal

duty to warn David of dangers known to it and not known to him arising in and about the place of his employment. The only distinction between McCarthy and any other special agent of the Company was the fact that McCarthy was under cover. Had any one of the special agents of the defendant been possessed of the same information that McCarthy had for twelve hours before the fatal attack, and had failed to carry out express orders to report it, we are confident that petitioner would not have the temerity to contend that the Company would not be responsible for his omission, whether David was specifically apprised of his employment or not.

Qui facit per alium facit per se. McCarthy's knowledge was the knowledge of the Missouri Pacific Railroad Co. His failure to report and hence to warn David was the failure of the Missouri Pacific Railroad Co. Mr. David's ignorance of McCarthy and his employment could not in any way alter that situation.

There is, therefore nothing in common between the *Mills* case and the case at bar, and again we submit that petitioner has failed to impeach the decision of the Supreme Court by the test laid down in *Great Northern Railway Co.* v. *Knapp, supra.*

V.

Petitioner Cannot Now Contend That McCarthy Was An Independent Contractor and Not An Employee On Whose Account the Doctrine of Respondeat Superior Applies.

(1) There is no merit in the contention that the Supreme Court of Missouri committed a palpable error

by holding that McCarthy was the agent of the petitioner and no decisions of this court are cited as being those with which it is claimed the decision of the Missouri court is in any way probably not in accord.

The statement at the beginning of this brief fully describes McCarthy's employment, its terms and his activities under it. If the contention on its merits had any place here it seems to us sufficient to say that if McCarthy was not an employee for whose acts in the line of his duty the petitioner was responsible, the Missouri Pacific Railroad Company has no such employees.

(2) But the contention has no place here. The question was not presented at the trial in the form of a request for instructions to the jury, or in any other way.

On the contrary defendant requested instructions which were given based on the theory that McCarthy was an employee (Deft's Inst. 4, Rec. 206). The question was not in fact raised before the Supreme Court of Missouri in any form until petitioner filed its petition for rehearing which was "denied and nothing more" (Rec. 234). Hence, under the familiar rule of this court this question is not open now.

Willoughby v. *Chicago*, 235 U. S. 45, 35 Sup. Ct. Rep. 23.

Wall v. *Chesapeake & O. Ry. Co.*, 256 U. S. 125, 41 Sup. Ct. Rep. 402.

VI.

Under the Evidence McCarthy Had Ample Opportunity to Communicate With the Petitioner.

The Supreme Court of Missouri adequately answers petitioner's argument in this connection in the following language:

> "Appellant contends that McCarthy had no opportunity for communicating with Boult over the telephone prior to the happening of the event without uncovering himself as an informer. The evidence, however, abundantly justifies a finding to the contrary. It shows that for reasons of his own McCarthy absented himself from the members of the gang for a brief interval two or three times during the evening prior to the departure for Leavenworth. It further shows that there were many other occasions during the same period when, on one pretext or another, he could have left them for a sufficient length of time to have gotten into communication with Boult's office—unless he was under suspicion, and that is not remotely suggested by the record" (Rec. 227).

At best, this was a question of fact for the jury which was submitted in plaintiff's Instruction 1 and defendant's Instruction F (Rec. 205-208).

From the statement made at the beginning of this brief, the court will observe that the record shows that this informant, who knew how to get in touch with the petitioner at all hours of the day and night, had sufficient information of the impending robbery from noon of the day before it occurred at one-thirty in the morning to have adequately fulfilled the requirements of the duty prescribed for him in his original contract of employment.

VII.

As to Failure of Proof of Proximate Cause.

The petitioner does not advance any discussion on this point, and we believe it has been adequately covered in the opinion of the Supreme Court of Missouri, and what has been said heretofore.

VIII.

The Jury Was Not Left to Conjecture, Speculation or Guess Work Because of Lack of Evidence.

We likewise believe that the points made in this section of the brief were adequately covered by the Supreme Court of Missouri (Rec. 231).

Conclusion.

It is respectfully submitted that the judgment below was not for the wrong but for the right party; that there is no reason to believe that in this decision the Supreme Court of Missouri has in any way departed from the rules of law long recognized and applied by this court, but, on the contrary, its decision here is entirely consistent and in accord with those rules of law.

There is no reason therefore why the petition for the writ of certiorari from this court to the Supreme Court of the State of Missouri should be allowed.

Respectfully submitted,

HORACE GUFFIN,
Attorney for Respondent.

EDMUND H. MCVEY,
SAMUEL R. FREET,
LESTER G. SEACAT,
Of Counsel.

FILE COPY

JAN 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 365

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

REVISED BRIEF FOR RESPONDENT.

HORACE GUFFIN,
of Kansas City, Mo.,
Counsel for Respondent.

EDMUND H. McVEY,
SAMUEL R. FREE[illegible],
C. A. RANDOLPH,
DESTER G. SEACAT,
of Kansas City, Mo.,
Of Counsel.

INDEX

Statement 1

The Special Agent's Department 2
The Train Riders 2
The Bandit Gang 4
The Employment of McCarthy 5
McCarthy's Instructions About Reporting 8
The Protection Provided 9
The Planning of the Fatal Robbery 10
The Events of the Evening 12
Mr. David's Train 14
The Shooting of Mr. David 14
McCarthy's Reports 16

Points, Authorities and Argument 18

I. David did not assume the risk of the particular robbery resulting in his death .. 18

II. Petitioner was guilty of actionable negligence directly and proximately causing David's death 33

III. McCarthy was the employee and servant of petitioner and petitioner cannot now be heard to say that he was an independent contractor 36

Conclusion 44

Appendix i

Table of Cases

Atlantic Coast Line vs. Southwell, 272 U. S. 64, 48 Sup. Ct. 25 xxx

Baltimore & Ohio R. R. vs. Burtch, 263 U. S. 540, 44 Sup. Ct. Rep. 165 43

Baxter vs. Roberts, 44 Cal. 187, 13 Am. Rept. 160 ..... 35, iv

Berry, Adm. vs. St. Louis, San Francisco Ry. Co., 26 S. W. (2nd) 988, l. c. 994, Certiorari denied 281 U. S. 765, 50 Sup. Ct. Rep. 464 18

Chesapeake & Ohio Railway Co. vs. De Atley, 241 U. S. 310, 36 Sup. Ct. Rep. 564 ..... 18, 26, xxiv

Chesapeake & Ohio Ry. Co. vs. Proffitt, 241 U. S. 462, 36 Sup. Ct. Rep. 620, l. c. 622 ..... 18, 26

Chicago & Northwestern Ry. Co. vs. Bower, 241 U. S. 470, 36 Sup. Ct. Rep. 624, l. c. 626 ..... 18, 27, xxiv

Chicago R. I. & P. Ry. Co. vs. Ward, 252 U. S. 18, 40 Sup. Ct. Rep. 275 ..... 18, 28, xxiv

Cincinnati N. O. & T. P. Ry. Co. vs. Hall, 243 Fed. 76, 80, 81, 82 (2) ..... 35, ix

Clift vs. Railway Co., (Div. 2, 1928) 320 Mo. 791 l. c. 799 xxv

Co-operant Tel. Co. vs. St. Clair, (C. C. A. 2nd Cir. 1909) 168 Fed. 645 ..... 35, ix

Dixon vs. Construction Co., (Div. 2, 1927) 318 Mo. 50, 298 S. W. 827 iii

Erie Ry. Co. vs. Purucker, 244 U. S. 320, l. c. 324, 325 18

Feaster vs. Southern Pacific Ry. Co., (C. C. A. 4th C. 1926) 15 Fed. (2nd) 540 xxxii

Gila Valley C. & N. R. Co. vs. Hall, 232 U. S. 94, 34 Sup. Ct. Rep. 229 18

Holzhauser vs. Denver Elec. Co., 18 Col. App. 431, 72 Pac. 289 ..... 35, v

Hough vs. Railroad, 100 U. S. 213, 217 18

Joyce vs. Wooster, (1885) 140 Mass. 345, 4 N. W. 565 xxix

Lowrey vs. Atlanta Joint Terminals, 145 Ga. 782, 89 So. 832 xxx

Manwell vs. Donrst, 178 Cal. 752, 174 Pac. 881, 1, A. L. R. 669 xxxi

M'Calman vs. Illinois Cent. Ry. Co., (C. C. A. 6th Cir.) 215 Fed. 465 ..... 35, vii

Mooney vs. Monark Oil & Refining Co., (Div. 1, 1927) 317 Mo. 1255, 298 S. W. 69 vi

Pantzar vs. Mining Co., 99 N. Y. 368, 376 19

Perry vs. Marsh, 25 Ala. 659 ..... 35, vi

Peters vs. George, (C. C. A. 3d Cir.) 154 Fed. 634 .. 35

Reed vs. Director Gen'l of Rlds., 258 U. S. 92, 42 Sup. Ct. Rep. 191 ..... 18, 28

St. Louis-San Francisco R. R. vs. Mills, 271 U. S. 344 ..... 24, xiv, xxxiii

Thomas vs. Missouri Pacific Ry. Co., 109 Mo. l. c. 200 xxix

Vestner vs. Northern Calif. Power Co., (1910) 158 Cal. 284, 110 Pac. 918 xxix

Wall vs. Chesapeake & O. Ry. Co., 256 U. S. 125, 41 Sup. Ct. Rep. 402 37

Willoughby vs. Chicago, 235 U. S. 45, 35 Sup. Ct. Rep. 23 37

TEXT BOOKS

7 Am. & Eng. Enc. of Law, (2d Ed.) 417 ..... ii, iii

39 C. J. 507 ..... i, ii

39 C. J. 827 iii

Labatt's Master and Servant, 2nd Ed. Sec. 1178 .. 19

18 R. C. L. 685, 686 xxiii

STATUTES

Sec. 51, Title 28, U. S. C. i

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 365

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

REVISED BRIEF FOR RESPONDENT.

STATEMENT.

(Page references are to the Transcript.)

James Lee David was employed, about April 1, 1923, by the Missouri Pacific as a train rider, at a salary of $135.00 a month and expenses. It was admitted that at the time of his death he was engaged in interstate commerce (11). He was the husband of

the widow-administratrix, Sophia David, the plaintiff in this case. They had been married twenty-two years at the time he was killed, and were the parents of two children, aged eighteen and nineteen, respectively. At the time of the trial she was still a widow and was operating a power machine for the Kansas City Garment Co. (173-175).

The Special Agent's Department.

In the company's organization the work of protecting property owned by and in the company's care, was in a special department, under a chief special agent, located at St. Louis. Directly under him were two assistant chief special agents, one located at Kansas City, Mo., and the other at Little Rock, Ark., between whom the company's territory was divided. Under the two assistants there were in all sixteen divisional special agents, each of whom had direct charge of the work on his division. Within each division there was a further detailed organization of lesser ranking personnel.

R. S. Mitchell of St. Louis was chief special agent. W. H. Boult of Kansas City was assistant chief special agent, assigned to the western lines (12-13). C. M. Barber was divisional special agent at Kansas City (193).

The Train Riders.

The train riders in the railway service were part of this department (23). They were under the jurisdiction of the divisional special agent, by whom they were assigned to the trains of the company, not on

regular runs, but as and where needed (24). It was their duty to examine the seals on the car doors and see that they were intact, and that the train was all right, both before departure and en route (35). They also investigated damage suits and personal injuries (34). In a general way they were to protect the trains (23). For this purpose they were provided with flashlights (190).

There was no fixed rule about the number that would be assigned to a given train. That was a matter within the discretion of the local man. If men were available more than one rider would be sent with a train.

Nor was there any fixed rule about where they would ride on a train. That was left to the rider's judgment (37). On the occasion in question, for example, there were two train riders, the deceased and one Boyd. When Mr. David boarded the train he rode in the caboose. At the first stop, he went on up through the train to the engine and there rode into Leavenworth (188).

Mr. Boult testified:

"Q. Were any train riders instructed to go armed?

"A. We never instructed them at all, they was to protect the train.

"Q. You knew, did you not, as to whether or not they were going armed, or whether they were going unarmed?

"A. Apparently did.

"Q. Well, didn't you give them any instructions in that respect?

"A. We never gave them any instructions not to go armed.

"Q. Well, did you ever give them any instructions to go armed?

"A. I don't know that I ever did.

"Q. When they went armed who provided them with guns, pistols, or firearms?

"A. They had them themselves. We didn't, the Missouri Pacific didn't" (36).

Mr. L. Q. Moore, a night sergeant under the special agent at Kansas City (193), and the man who assigned Mr. David and Mr. Boyd to the fatal ride, described one of the serious complications in this case in this way:

"Q. Now, Mr. Moore, have you also served as train rider?

"A. Yes, sir; I have ridden a few trains—not very much.

"Q. As a matter of fact, there are frequently tramps found riding trains, aren't there?

"A. Yes, sir.

"Q. Men who are just bumming rides from different points to different points, aren't there?

"A. Yes; that is true.

"Q. And men who are not attempting to resort to robbery or crime of any kind—just trying to get a lift from one town to another? That is true, isn't it?

"A. *Well, you can't tell what a fellow is doing when he is riding a train*" (186).

The Bandit Gang.

For some time before Mr. David was employed, the company had been annoyed by an organized gang of thieves in and about Kansas City (16). Among some dozen members of the gang, Bert Gladson,

Lawrence Hayes, Nathan (Red) Loar and Hogy Ward were identified as participants (40). They were bad men, described by Mr. Boult as being:

> "The biggest bunch of thieves, and bank robbers and murderers (including) the man who had formerly shot our special agent, Fred Conklin, at Osawatomie" (56).

The divisional special agent, Mr. Barber, and Mr. Moore, the night sergeant, both said that this gang would shoot on sight (194, 183). Lawrence Hayes, one of the gang, testified that loaded guns were carried and that they were for use when occasion required; that the gang would shoot its way out of trouble, if trouble confronted it (163).

Naturally the gang diversified its activities and shifted its attack. "They don't rob any particular run, at different parts of the road" (Boult, 39). Robberies were mentioned at Leavenworth, Atchison, Stillwell, Osawatomie and Paola, in Kansas, and at Pleasant Hill and Raytown, Missouri (39-42). These affairs did not happen every night. "We were being robbed every week around Kansas City at this time" (26). At the time he was employed Mr. David was informed of this situation and told to be careful and watch out for himself (183, 194).

The Employment of McCarthy.

Mr. Mitchell, the chief special agent, became very much concerned about the company's losses from this source and resorted to the familiar and common weapon of espionage (16, 199). Through the Union Pacific's

chief special agent, Mr. Mitchell and one Harry McCarthy were brought together in the Baltimore Hotel at Kansas City, where McCarthy was hired. McCarthy was employed about April 5, 1923 (39).

Of McCarthy's employment, Mr. Mitchell testified:

> "I talked with McCarthy probably two or three hours, at which time he told me the history of the robberies committed by this gang; he told me at that time who was acting as head of the gang, who was furnishing the brains for these thieves, and he told me a great many details in connection with these robberies; he told me that he was trailing with the gang and he wanted to get away from them. *I arranged with him to keep us informed as to the activities of this gang, to give us advance information, if possible, when this gang planned to rob our trains,* and further arranged with him, in the event he could not get to us, couldn't give us advance information, to give us information then as to the fence where the stuff was taken, as well as who was in the robbery, and all the details possible. I arranged with him to pay him one hundred and fifty dollars a month for that sort of service, and then I called in my assistant, Mr. W. H. Boult, and I introduced Boult to McCarthy, and arranged with McCarthy his way of reporting to Mr. Boult, and left the matter in Mr. Boult's hands." * * *

Under the terms of his employment, McCarthy was to continue in his depredations with the gang, get advance information as to the time and place of their robberies, and notify petitioner thereof in advance, if possible to do so without being uncovered to his gang, and, if not possible, to notify them what disposition was made of the stolen goods.

Boult testified:

"Q. Well, now, did he tell you he had been robbing with these men, or that he merely knew them?

"A. I took it from his talk he had been with them.

"Q. Participating?

"A. Participating, yes, he didn't come right out and say it, but I took it from his talk.

* * * * * * *

"Q. Well, what was the plan and arrangement in respect to whether or not he was to go with this gang on their robberies, robbing expeditions?

"A. He was to continue the same as he did to get information, that is generally up to the man's own idea that is working.

* * * * * * *

"Q. What were the instructions given to McCarthy with respect to his going right along with the gang and at least pretending to participate in the robberies the same as the others?

"A. He was to continue as he was doing.

"Q. As he had been doing, you mean?

"A. Yes, sir; as he had been doing.

* * * * * * *

"Q. Now, after McCarthy was employed did he report for duty to you or to anybody else at any particular place each day or each week?

"A. At times he would call up on the 'phone when he wanted to give us any information (40, 41, 43).

"Q. He knew how to get hold of Mr. Boult?

"A. Yes, night and day service.

"Q. And where he could reach Mr. Boult at any time if he might want him?

"A. Yes, sir.

"Q. Did you know who the thieves were with whom he was supposed to be associating?

"A. He told me all of their names at that time.

"Q. Who were they?

"A. I don't remember all of them; one was named Loar, one was Gadshen—

"By Mr. Hackney: I think it is Gladsten; Hayes.

"By the Witness: Yes, Hayes; Loar, Gladsten; I don't know; there was a dozen of them (17-18).

"Q. The substance of your three hours' conversation amounts to this, then; That he was to continue to trail with these thieves, with whom he was acquainted, and was associating, to acquire any information he could possibly get about any anticipated robberies they were going to pull off, and to immediately inform you of those things?

"A. Yes (32)."

It had been the practice and custom among railroads to hire members of train robber gangs to tip off and frustrate robberies, and thus to assist in catching the gang (201).

McCarthy's Instructions About Reporting.

Mr. Boult, the assistant chief special agent, was thoroughly conversant with this arrangement.

"Q. Well, what was the plan and arrangement in respect to whether or not he was to go with this gang on their robberies, robbing expeditions?

"A. He was to continue the same as he did to get information, that is generally up to the man's own idea that is working.

"Q. Well, do you mean the plan was that he was to continue with this gang, Gladsen, Loar, Hayes and others?

"A. *His instructions were that he was to get us word before the robbery was committed, if he could, if not, to give us information as soon as he could after the robbery had been committed.*

"Q. Who was he to report this information to?
"A. Myself.
"Q. Did you advise him as to how to reach you *any time through the night or day?*
"A. *Through the telephone*" (41, 43).

The Protection Provided.

The purpose of these reports was obvious. Mr. Mitchell testified:

"Q. You say he was to make his reports to Mr. Boult?
"A. Yes, sir.
"Q. Or to someone that Mr. Boult might designate?
"A. That is it; I left him in Mr. Boult's lap.
"Q. That was to enable you to fortify yourselves against the expected robbery?
"A. Yes, that was to enable us to catch these thieves.
"Q. You expected, whenever you got notice from McCarthy that anything like that was to take place, to detail additional men on the train at that time, or wherever the robbery was to occur?
"A. No, it was taken care of in various ways; that was one of the ways?
"Q. What were other ways?
"A. Take an automobile and go out and intercept them" (22).

Apparently all the train riders, particularly those operating out of Kansas City, knew of McCarthy's employment and his activities in reporting in advance when and where the gang was to rob defendant's trains.

Mr. Boult graphically described what took place on one occasion a short time before David was killed,

when McCarthy reported an impending robbery. About five o'clock one evening McCarthy reported in person to Mr. Boult, in Kansas City, Missouri, that the gang was going to rob a train at Kenneth Tank in Kansas (according to the map, this is about twenty-five miles out of Kansas City).

"We immediately went there with the men to cover that place. * * * We immediately got our men, got help from Paola and covered this point all night.

"Q. Did you also notify the train riders on these respective trains to be on the lookout?

"A. Yes, sir.

"Q. Did you put on any extra train riders?

"A. That night we didn't. We didn't have them.

"Q. But you warned them all?

"A. We warned them all.

"Q. And in addition to that you had police officers covering the place where the robbery was expected to take place?

"A. Not that night" (44-45).

David reported at the office every morning (184).

McCarthy from the time of his employment until the time Mr. David was killed made other reports to Mr. Boult from time to time, not regularly, but apparently they were in touch with each other all of the time (43). Mr. Boult's best recollection was that McCarthy might have called him as late as the day before Mr. David was killed (48).

The Planning of the Fatal Robbery.

On May 16th, 1923, Hogy Ward, one of the gang, was being tried in the District Court of Wyandotte County, Kansas, for a payroll holdup. Certain of his

confederates were in attendance as spectators. This group included Bert Gladsen, Lawrence Hayes, George Riley and others, as well as McCarthy (62, 118).

Out in front of the court house during the noon hour they (including McCarthy) had a conversation about robbing box cars of the Missouri Pacific at Leavenworth that night. "We had intention of coming up and robbing box cars that night," and the plan was agreed upon (63-64).

"Q. To rob any particular train?

"A. Why, most generally they get the best merchandise there, about one-thirty in the morning" (76).

This was a train that carried cigarettes mostly and they were interested in cigarettes. It stopped at Leavenworth and it was at Leavenworth that they expected the robbery to take place (66, 120).

They discussed the expedition at different times, practically all afternoon. Lawrence Hayes testified that he first heard of it somewhere around two o'clock (118-119). They decided that right after the trial adjourned they would meet down at Riley's house, when and where they would make their arrangements, "try to get two cars to come up, some of the boys didn't want to come up" (Gladsen 63).

After court had adjourned that evening they all went down to Riley's house on South Coy Street in Armourdale. There they consulted, and Gladsen, Hayes, McCarthy and one Charles Masterson agreed to go. This was about six-thirty in the evening (66-67).

Mrs. Ada Riley, mother of George Riley, testified to this meeting. It occurred, she said, along in the evening, near supper time. She understood that Missouri Pacific box cars were their objective and Leavenworth the chosen place (170-172).

The Events of the Evening.

They left Riley's house about six-thirty or a quarter of seven and went to a restaurant to eat (121). Then McCarthy, Hayes and Masterson drove to the Federal Reserve Life Insurance Building, at Seventh and Armstrong in Kansas City, Kansas (a block south of Minnesota Avenue), where Masterson wanted to see a doctor. They stopped in front of the building somewhere near eight o'clock. McCarthy and Masterson got out, Hayes waited in the car. Masterson went up to the doctor's office and McCarthy went *alone* to a drug store on the northeast corner of Seventh and Minnesota one block and a wide street north of Hayes and the car (122-123).

Masterson came back from the doctor's office in five or six minutes, got in the car, sat down, lit a cigarette and announced that the doctor was out and that he was going to wait. Hayes then proposed that they go down to the drug store and get something to drink. They turned around, drove to Minnesota Avenue, parked the car, locked it, went over to the drug store and joined McCarthy (122-123). Hayes estimated that from the time McCarthy left the car in front of the doctor's office until they rejoined him at the drug store, some seven or eight minutes elapsed.

McCarthy was just looking around when they got there (124).

The three of them had a drink together and then Masterson went back to the doctor's office. McCarthy and Hayes drove to the foot of Minnesota Avenue (at Second Street) and watched a Missouri Pacific freight train go by (Hayes, 125). After that they drove back to Tenth and Minnesota, south on Tenth to Central Avenue, where they picked up Gladsen (125-126).

Wanting a fourth member of the party, they then drove to Nathan (Red) Loar's home, on South Fifth Street, in Armourdale. All the lights were out and McCarthy got out of the car, alone, went up on the porch and asked for Loar (68). Loar had been in bed and it took him ten or fifteen minutes to dress and come to the car (126).

They then drove to Ferry and Osage where McCarthy's sister lived, and McCarthy again got out of the car *alone* and went to the front porch to get some overalls and a jumper. This house sat back on an alley. They stopped the car on the street. McCarthy's errand that time took him some 60 yards away from the parked car (126, 127).

Then they drove to Gladsen's home, at 833 South 13th Street, where they picked up two guns and an iron bar to open box car doors with (127).

They then drove straight to Leavenworth (68). They left Kansas City, Kansas, somewhere around ten o'clock and got to Leavenworth about eleven-fifteen or twenty—a drive of a little over an hour. They

stopped at an old sugar refinery on a little creek bridge about half a block from the Missouri Pacific tracks, and waited for the train (128). "Oh, we must have waited about an hour or an hour and a half" (Gladsen, 69).

Mr. David's Train.

In the meantime, Train No. 173, a freight, was made up in the yards in the East Bottoms of Kansas City, Missouri. Its cargo was destined for points in Kansas and elsewhere (187, 38). It left Kansas City about ten o'clock (128).

On the night of May 16th, 1923, the train consisted of fifty-five or sixty cars. Mr. David probably boarded it at the A. C. Junction. He rode the caboose from Kansas City, Missouri, to Wolcott, Kansas, the first stop. There he left the caboose and went up through the train to the head end, and rode on the engine into South Leavenworth. The other train rider, Boyd, rode the caboose from Wolcott into Leavenworth. At South Leavenworth they took a siding to clear the track for a passenger train and stopped (188-189).

The Shooting of Mr. David.

When the train whistled at Leavenworth, McCarthy and Gladsen got out of the waiting bandit car and Hayes and Loar left. It was the plan that the former would break into the cars at South Leavenworth, get the stuff ready and throw it out at a particular crossing previously agreed upon in the north end of town, where the other two with the car would meet them and return with the loot to Kansas City (131).

McCarthy and Gladsen went over to the railroad track, hopped the train and rode on down in the yards to the place where the train stopped. They were both armed and McCarthy had the pinch-bar, the breaking tool (69-70).

The train had been on the passing track probably ten minutes when the fatal shooting occurred. Mr. Dougherty, the train conductor, and Mr. Boyd, the other night rider, left the caboose and proceeded forward between the main line and the passing track. Boyd was behind Dougherty. When they reached a point twenty-five to thirty car lengths from the engine, he heard two shots "pretty close together," fired about four or five car lengths ahead of where they were. Dougherty went to Mr. David and found him lying on the ground dead. He testified, "it appeared he was shot (in the chest somewhere) from someone standing up and ranged downward" (191). Mr. David fell between twenty and twenty-five cars lengths from the engine, where he had been when the train stopped, and on the same side of the train where Dougherty and Boyd were walking. Mr. Dougherty did not see Mr. David when he was shot, did not see the shooting and saw no gun-flashes. Mr. David had a revolver and sawed-off shot gun on him at that time (186-192).

The first information Mr. Boult had about the affair came to him after the killing. His night sergeant called him at his home in Kansas City, and he, the sergeant and two special agents drove to Leavenworth that night (50).

McCarthy's Reports.

The first report Boult had from McCarthy he received between seven and eight o'clock the next morning when one of his officers called Mr. Boult at Leavenworth on the telephone from Mr. Boult's office in Kansas City. McCarthy was at the office at the time and talked with Mr. Boult over the telephone. Later Boult talked with him in person. McCarthy gave him "all the information on who killed David, how it happened, and he went to Leavenworth with me to make the report to the county attorney" (Boult, 52).

The defendant developed on the cross examination of Lawrence Hayes that McCarthy testified in the trial of Bert Gladsen for the murder of Mr. David, where he was convicted and given a life sentence, and that McCarthy there testified that Gladsen was the man who shot David (140). Mr. Mitchell also testified:

> "Q. So after the killing of David, then McCarthy assisted in convicting these men that were responsible for Mr. David's death?
> "A. Testified against them, yes, sir.
> "Q. They were on trial over there in the Kansas court and Gladsen is the man shown to have shot David?
> "A. Was convicted of shooting David.
> "Q. And is serving a life sentence now?
> "A. And is serving a life sentence now.
> "Q. At Lansing, Kansas?
> "A. Yes, sir.
> By Mr. Hackney: That is all" (30).

McCarthy was continued in the service for some time. After he had testified, they got him a laborer's

job in the roundhouse or shops, and "I (Mr. Mitchell) kept him employed for some time * * * My instruction to Boult was to help McCarthy." Finally he left of his own accord (28-29).

McCarthy, however, did not testify at this trial.

Although the defendant had the knowledge of the intended robbery twelve hours in advance thereof, David and Boyd were not notified thereof.

"Q. Had any warning or information been given David or Boyd of this particular intended robbery at Leavenworth, Kansas?

"A. The night David was killed?

"Q. The night David was killed.

"A. I had no information that there was going to be one and there was no reason why we should give them one that night.

"Q. So, you didn't give—

"A. (interrupting) They had general instructions at all times.

"Q. I say, so you didn't give them any particular instructions that night?

"A. I didn't have any information" (Boult, 59).

POINTS, AUTHORITIES AND ARGUMENT.

I.

David Did Not Assume the Risk of the Particular Robbery Resulting in His Death.

While David undoubtedly assumed the ordinary risks incident to his employment as a train rider, as well as the risks which were extraordinary but open, obvious, or known to him, yet he did not assume special and extraordinary risks not known or appreciated by him, but which were known by the petitioner and concerning which the petitioner by ordinary care could and should have warned him.

Chesapeake & Ohio Railway Co. v. *De Atley*, 241 U. S. 310, 36 Sup. Ct. Rep. 564.

Chicago & Northwestern Ry. Co. v. *Bower*, 241 U. S. 470, 36 Sup. Ct. Rep. 624, l. c. 626.

Chesapeake & Ohio Ry. Co. v. *Proffitt*, 241 U. S. 462, 36 Sup. Ct. Rep. 620, l. c. 622.

Gila Valley C. & N. R. Co. v. *Hall*, 232 U. S. 94, 34 Sup. Ct. Rep. 229.

Chicago R. I. & P. Ry. Co. v. *Ward*, 252 U. S. 18, 40 Sup. Ct. Rep. 275.

Reed v. *Director Gen'l of Rlds.*, 258 U. S. 92, 42 Sup. Ct. Rep. 191.

Erie Ry. Co. v. *Purucker*, 244 U. S. 320, l. c. 324, 325.

Berry, Adm. v. *St. Louis, San Francisco Ry. Co.*, 26 S. W. (2nd) 988, l. c. 994, Certiorari denied 281 U. S. 765, 50 Sup. Ct. Rep. 464.

Hough v. *Railroad*, 100 U. S. 213, 217.

Pantzar v. *Mining Co.*, 99 N. Y. 368, 376.
Labatt's Master and Servant, 2nd Ed., Sec. 1178, and cases cited in notes.

David was employed by petitioner on April 1, 1923, as a train rider working out of petitioner's Kansas City office under the supervision of Boult and Barber. The duties of his employment were various. He was required to inspect petitioner's trains and other property not only in the yards but also when assigned to that work was to go with the train, and wherever the train stopped it was his duty to go through the train or to get off and walk alongside the train and inspect it, particularly the seals on the car doors, to make sure that they had not been tampered with, and to guard and protect the property in transit. For this purpose he sometimes rode in the caboose and sometimes on the engine or at any other place on the train, as his judgment dictated (35). Other duties of train riders were to investigate damage suits against the railroad and robberies that had been perpetrated (34).

In his work of protecting and guarding the railroad's properties in the yards and in transit he might encounter thieves, burglars, robbers, or tramps attempting merely to steal a ride on the petitioner's trains (186).

At the time of his employment he was advised of the robberies and depredations of a particular gang which had been operating at irregular times and at widely divergent points on petitioner's various lines, and was told that he might encounter that gang at any

time or place. At the time of his employment on April 1, no means or method had been adopted by petitioner for ascertaining in advance the operations of this gang, so that at that time the only warning the petitioner could give David was that he was likely to encounter this gang at any time or place and that he should be on the lookout for that gang.

However, thereafter, on the fifth day of April, 1923, petitioner employed one McCarthy, a member of this gang, with instructions to work under cover and cooperate with petitioner's inspection department and assist petitioner to trap the members of the gang in order that they might be brought to justice and their depredations upon petitioner's property stopped (39). McCarthy was hired to work secretly so far as the other members of the gang were concerned and instructed to trail along with this gang and ascertain from them in advance when and where the gang was to rob petitioner's trains, and then to notify petitioner of said time and place so that petitioner might be prepared by concentrating its train riders as well as the police and other peace officers and be thereby enabled to surprise and capture the members of the gang. McCarthy was further to notify petitioner where the gang disposed of property stolen from petitioner. McCarthy was employed by the month for this purpose and paid a wage of $150.00 per month therefor. It was his duty to report to petitioner's assistant chief special agent, Mr. Boult, at the Kansas City office from time to time of the operations of this gang, and arrangement was made whereby Mr. Boult

could be reached by telephone at any time, day or night, for the purpose of making his reports and particularly for the purpose of advising Boult of the time and place of an intended robbery by this gang, and it was made the duty of McCarthy to ascertain such intended robberies and to report the same to Mr. Boult in advance, if it was possible for him to do so without uncovering to the members of the gang his duplicity.

A short time before David was killed, McCarthy reported to petitioner's inspection department an intended robbery which the gang had planned of one of petitioner's trains at Kenneth Tank, Kansas. Accordingly, the train riders were advised of this report and they and police officers went to Kenneth Tank prepared to capture the gang when they attacked the train at the appointed time and place. However, in some way the plans of the gang miscarried and no robbery was attempted on that occasion (44). David reported at the inspection office in Kansas City every day. It is a fair inference from this testimony that David was aware of McCarthy's employment and of the method which petitioner had adopted of ascertaining in advance and reporting to the train riders the time and place of the attacks and depredations of this particular gang of train robbers. There is testimony that only Inspector Mitchell and Assistant Inspector Boult knew of McCarthy's employment. However, Barber, who was the immediate superior of David and the other train riders operating out of Kansas City, admitted that he knew all about the employment

of McCarthy long before David's death, as well as the duties to be performed by McCarthy (200).

It is therefore fair to assume from the above facts and circumstances that whatever the situation may have been at the time David was employed, that at the time of the robbery perpetrated by this gang resulting in David's death, that David knew of McCarthy's employment and activities, and of the method which petitioner's inspection department had subsequently inaugurated, through which he and other train riders would be warned and notified concerning the time and place of the attacks and depredations of this particular gang of train robbers. Accordingly, he had a right to rely upon this method of giving advance warning, and it is reasonable to infer that he did rely thereon.

Under this testimony, McCarthy and members of this particular gang at noon on May 16, planned the robbery of petitioner's train to take place at Leavenworth, Kansas, to take place after midnight the following morning. The jury found on ample evidence that McCarthy within the period of 12 or 13 hours intervening, could reasonably have reported the time and place of this planned robbery to petitioner's inspection department without danger of uncovering himself to the train robbers, and that he was negligent in not doing so (204-206). As a result the train robbers surprised David and other employes of the train and shot and killed David from ambush at a time and place when David and other employees on the train were not suspecting an attack, and without opportunity

to protect themselves and at a time when he was walking alongside his train inspecting the seals and performing the duties of his employment. He was shot from above and the other employees did not see the assassin or the flash from his revolver, indicating that the killer had concealed himself between two cars of the train and while standing on the coupling, or sill of one of the cars, shot David the moment he came into view while walking alongside the train performing his duties as aforesaid.

It would seem clear from the above facts that this sudden and unexpected attack by the gang of train robbers amounted to an extraordinary and special peril or danger resulting from the negligence of David's coemployee, McCarthy, and hence chargeable to the petitioner under the Federal Employers' Liability Act, and not one of the ordinary risks incident to his employment. It was not obvious or open, but an ambushed attack. Petitioner concedes that this particular peril was not known or anticipated by David. If David knew of the method petitioner had adopted for his and his fellow train riders' safety, and it would seem that he must have from what had theretofore transpired, he had a right to rely upon the performance of McCarthy's duty to furnish advance information of the time and place of the attack by this particular gang of robbers in order that he might be prepared to cope with them at least on equal terms. If this duty had been performed, David and his fellow train rider, Boyd, and perhaps others, would have been afforded the opportunity of capturing Gladsen, the

assassin, when the latter and McCarthy first boarded the train. At least, David could have avoided exposing himself to being shot, as he so unsuspectingly did expose himself.

As we view the situation, it is immaterial whether or not David knew of the petitioner's employment of McCarthy to furnish advance information concerning the depredations of this gang. The doctrine of assumption of risk, particularly as to dangers that are not open and obvious, rests upon the assumption that the servant has an equal opportunity with his master to know or ascertain the particular risk assumed by him. Hence, the doctrine does not apply where the master or someone for whom the master is responsible knows of a particular hazard or risk not known to the servant. The duty of the master to his servant is constant and continuing to use ordinary care to make and keep his place of work safe and to minimize the hazards connected therewith. Good faith requires that the master warn the servant of any extraordinary or special hazard known by the master and unknown to the servant, and where there is no parity of knowledge of such danger, such risk is not assumed by the servant, as shown by the above cases of this court and other courts.

There is no analogy between the facts of this case and those in the case of *St. Louis-San Francisco R. R.* v. *Mills*, 271 U. S. 344, cited and relied upon by petitioner. In that case the master, during a strike, had one of its guards accompany the plaintiff home from his work and while on his way home he was attacked

by strikers. This court rightly held in that case that the master owed no duty to the servant after his day's work had been completed and he had left the master's premises, and that because the master performed the gratuitous service of having a guard accompany him home could not be held liable for failing to do more. David was killed in the performance of his duties for petitioner. The petitioner owed him a continuing duty to use ordinary care at all times for his safety, and recognizing that duty, had inaugurated a method or system which, if the employee charged with operating that system or method had performed his duty, would have prevented David's untimely death. The institution of this method or system by petitioner was not gratuitous in any sense of the word. McCarthy had as important a duty to perform as did David and other train riders. The end sought to be accomplished by the employment of each was the same. The train riders worked openly in the inspection and protection of petitioner's property and the property belonging to the public being carried by petitioner's trains. McCarthy was working in the same department under cover with the end and purpose of apprehending and bringing to justice the members of this gang of train robbers and at the same time so anticipating their depredations as to protect the train riders and other employees of petitioner from the dangers of being surprised and shot by this gang. Hence, the petitioner in employing McCarthy, was performing a service and duty which it owed not only to its stockholders and creditors, but to shippers using its lines for the trans-

portation of freight, and to the public generally. Why, then, was David not entitled to the protection and benefits which ought to have accrued to him through the inauguration of the method in question, which, if McCarthy had performed the duty imposed upon him, would have resulted in his being timely warned of the particular hazard which, at an unguarded and unsuspecting moment, swept him to his death?

In discussing extraordinary and special risks of the above nature, this court in *Chesapeake & Ohio Ry. Co.* v. *DeAtley*, 36 Sup. Ct. Rep. 564, l. c. 566, said:

> "According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

Also in the case of *Chesapeake & Ohio Ry. Co.* v. *Proffitt*, 36 Sup. Ct. Rep. 620, l. c. 622, this court announced the following applicable rule:

> "And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right

> to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work), and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it. The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence. *Texas & P. R. Co.* v. *Archibald,* 170 U. S. 665, 671, 672, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; *Choctaw, O. & G. R. Co.* v. *McDade,* 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Am. Neg. Rep. 24, 15 Am. Neg. Rep. 230; *Texas & P. R. Co.* v. *Harvey,* 228 U. S. 319, 321, 57 L. ed. 852, 855, 33 Sup. Ct. Rep. 518; *Gila Valley, G. & N. R. Co.* v. *Hall,* 232 U. S. 94, 101, 58 L. ed. 521, 524, 34 Sup. Ct. Rep. 229; *Seaboard Air Line R. Co.* v. *Horton,* 233 U. S. 492, 504, 58 L. ed. 1062, 1070, L. R. A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834."

This court laid down a similar rule as to extraordinary and special hazards in the case of *Chicago & Northwestern Ry. Co.* v. *Bower,* 36 Sup. Ct. Rep. 624, l. c. 626, as follows:

> "In short, while he knew there were certain dangers naturally incident to the use of tubular glasses upon the lubricator, there is nothing to show that he knew or had any ground to believe that his employer had been wanting in the exercise of proper care for his safety, or that because of such want of care the danger to him was greater than it ought to have been. Without this, he could not be held to have assumed the increased risk" (citing cases).

The case just quoted from is authority for our contention that it is immaterial whether or not David knew of the method or system inaugurated by the petitioner, after his employment, by which David should have been warned of the particular hazard which took his life.

Under the Federal Employers' Liability Act, an employee or his dependents may not only recover against his employer because of the negligent act of a fellow servant, or any other employee of his master, but the negligence of such other employee may also create a risk which the injured employee does not assume. This court in *Reed* v. *Director Gen'l of Railroads,* 42 Sup. Ct. Rep. 191, l. c. 192, quoted from *Chicago, Rock Island & Pacific R. R. Co.* v. *Ward,* 252 U. S. 18, 40 Sup. Ct. Rep. 274, as follows:

> " 'The Federal Employers' Liability Act places a coemployee's negligence, when the ground of the action, in the same relation as that of the employer as regards assumption of risk.' "

It is therefore plain that David did not assume the negligent breach of duty of McCarthy in failing and omitting to furnish to petitioner's inspection department definite knowledge possessed by him which in turn would have been transmitted to David and prevented his assassination.

The hazards and risks of any given occupation fall within four classes: (1) those known by both parties; (2) those known by either party; (3) those known by the servant and not by the master; and (4) those known by the master and not known by the

servant. While the servant may be said to assume those risks falling within the first three classifications, it would be a complete perversion of the whole doctrine of assumed risk to say that it applies to any case falling within the fourth classification. At the time of David's employment, the risk which caused his death might be said to be one known by neither party, and on the theory that David had an equal opportunity with petitioner to discover the risk, he might be said to assume it as a part of the duties of his employment. But when the petitioner, five days later, inaugurated a system and method by which it could ascertain and did ascertain in advance the time and place of the risk constituting the special and extraordinary hazard, such hazard then became one resulting from the negligence of petitioner, because it was within the petitioner's power to obviate the risk and danger by giving a timely warning thereof to David.

Assumption of the risk is an affirmative defense, and the burden was on the defendant to establish that David assumed the risk resulting in his death. It was not necessary that the plaintiff anticipate such defense in her petition or disprove it by the testimony. If, under all the evidence, it appears that for any reason David did not assume the particular risk causing his death, then the court ought not to say that he did assume it. Concerning the employment of McCarthy, Boult testified:

> "Q. Well, now, did he tell you he had been robbing with these men, or that he merely knew them?

"A. I took it from his talk he had been with them.

"Q. Participating?

"A. Participating, yes, he didn't come right out and say it, but I took it from his talk.

* * * * * * *

"Q. Well, what was the plan and arrangement in respect to whether or not he was to go with this gang on their robberies, robbing expeditions?

"A. He was to continue the same as he did to get information, that is generally up to the man's own idea that is working.

* * * * * * *

"Q. What were the instructions given to McCarthy with respect to his going right along with the gang and at least pretending to participate in the robberies the same as the others?

"A. He was to continue as he was doing.

"Q. As he had been doing, you mean?

"A. Yes, sir; as he had been doing."

The testimony is without contradiction that McCarthy, pursuant to this understanding and arrangement with petitioner, participated in the plan to rob petitioner's train. McCarthy, Gladsen, Loar and Hayes, and perhaps other members of this gang, planned, confederated and conspired, to go to attack petitioner's train at Leavenworth. They went to Leavenworth with that purpose. Petitioner's employee, McCarthy, accompanied Gladsen when they boarded David's train, and was present when Gladsen fired the shots that killed David. Because of the conspiracy, Hayes and Loar, who were not present at the killing, were convicted along with Gladsen and sent to the Kansas penitentiary for the killing of David. Accordingly, the act of Gladsen in killing David was

the act of McCarthy as well as the act of the other two confederates. Therefore, McCarthy was liable both criminally and civilly for David's death. In short, David's death resulted from the act of one of petitioner's employees. Quite aside from petitioner's duty to notify David of the intention of the gang to rob its train at the time and place in question, McCarthy owed an independent duty, and the petitioner, through McCarthy, owed an independent duty to David to warn him of what was about to happen, and to frustrate Gladsen, or to take some measure which would have prevented Gladsen from shooting David. While this negligence was not alleged in plaintiff's petition and plaintiff had no right to recover on the basis of such negligence, yet this testimony thoroughly demonstrates the inapplicability of the defense of assumed risk under the facts presented by this record. It comes with poor grace indeed for the petitioner to say that David assumed the risk of being killed by the act of one of petitioner's own employees.

Moreover, petitioner's employment of McCarthy, and the terms thereof, contemplated, as shown from the above testimony, that McCarthy would continue on his robbing expeditions with the gang, so that by the terms of his employment, it was contemplated that he do just what he did in this case. Petitioner should have foreseen that some of these depredations by McCarthy and the gang might have occurred without advance notice to the petitioner and in consequence thereof that its train riders might be surprised and injured or

killed by members of the gang; or that McCarthy himself, likewise an employee of the petitioner, might be killed by one of its train riders if the train riders were not notified and fully warned in respect to McCarthy's employment. Now it is petitioner's position that David was not told about the employment of McCarthy and what he was doing. If McCarthy's employment was kept secret from the train riders as claimed by petitioner, such fact alone would be sufficient to *increase* and *create* hazards both for the train riders and for McCarthy which had not theretofore existed. Moreover, if David and the other employees had been warned thereof and knew who McCarthy was and what he was doing, McCarthy might be able to disclose himself at the time of the robbery to the train riders, without suspicion of his confederates, so as to put them on their guard rather than to allow them to expose themselves to almost certain death, and this he could do, even though he had failed to supply the inspection department with advance information of the time and place of the depredation. Accordingly, if David did not know of McCarthy's employment as claimed by petitioner, petitioner was doubly negligent in failing to advise David of such employment and in providing some means whereby the train riders might be apprised during the robbery of McCarthy's presence and of the robbery that was impending.

The above considerations serve to accentuate the special and extraordinary nature of the risks and dangers attending the staging of this robbery by McCarthy and his confederates, and to illustrate more

clearly the inapplicability of the doctrine of assumed risk. That venerable doctrine may not be used by petitioner as a cloak to protect it from the results of so nefarious an undertaking as that planned and executed by its employee, McCarthy, with petitioner's sanction which could be calculated only to result in the death, either of one of petitioner's train riders, or in the death of McCarthy, or perhaps both.

II.

Petitioner Was Guilty of Actionable Negligence Directly and Proximately Causing David's Death.

Petitioner's negligence was submitted to the jury under Instruction 1 (204). By that instruction the jury was told that if it found from the evidence that petitioner had employed one McCarthy as an informant to ascertain and report to petitioner the operations of certain persons who planned and intended to rob petitioner's train and that the said McCarthy ascertained and knew on the 16th day of May, 1923, that said persons intended to rob the train on which David was riding at Leavenworth, Kansas, on the early morning of May 17, and that after learning of such robbery, he could by the exercise of ordinary care and with safety to himself, have notified the petitioner and that the petitioner could thereafter have warned David, but that McCarthy negligently and carelessly failed to report said information and that persons at said appointed time and place attempted to rob said train, and that one of their number killed David, and

that the negligence of the said McCarthy in failing to report said intended robbery directly caused the said David's death, that plaintiff was entitled to recover against petitioner.

Said instruction was amply supported by the testimony as may be seen by a most casual reading of the record, and as more particularly set forth in respondent's statement herein. It was shown that McCarthy knew of the time and place of this robbery some 12 or 13 hours in advance thereof, and that for 10 hours he was within the populous district of Kansas City, Kansas, a city of 100,000 inhabitants, where he might have had access to a telephone at all times; that at various times he was entirely alone and out of sight of all other members of the gang; that arrangements had been made for him to reach Inspector Boult by telephone at any time during the day or night. Moreover, on one pretext or another, he might have absented himself from the other members of the gang at other times and communicated this knowledge to petitioner's inspection department.

Also it was shown that David had no advance information of this particular robbery; that he was walking along in the open alongside the train inspecting the seals, entirely exposed, and that while in this position, without the slightest knowledge or intimation of any danger or any immediate danger, he was shot down from ambush without any opportunity whatever to protect himself or to use such weapons as he had on his person, and without an opportunity to take ref-

uge or be able to cope with the robbers on anything like equal terms.

Moreover, it was definitely shown that he was killed by a member of this very gang and in the presence of employee McCarthy, and that said member and other members of the gang were convicted of his murder and sent to the Kansas penitentiary.

In short, negligence of the most flagrant variety was proved, and it was shown definitely that his death was the sole and unquestioned result of such negligence. That under this evidence petitioner was negligent in failing to warn David is amply sustained in the following cases:

Peters v. *George,* (C. C. A. 3d Cir.) 154 Fed. 634.

M'Calman v. *Illinois Cent. Ry. Co.,* (C. C. A. 6th Cir.) 215 Fed. 465.

Co-operant Tel. Co. v. *St. Clair,* (C. C. A. 2nd Cir. 1909) 168 Fed. 645.

Cincinnati N. O. & T. P. Ry. Co. v. *Hall,* 243 Fed. 76, 80, 81, 82, (2).

Baxter v. *Roberts,* 44 Cal. 187, 13 Am. Rept. 160.

Holzhauser v. *Denver Elec. Co.,* 18 Col. App. 431, 72 Pac. 289.

Perry v. *Marsh,* 25 Ala. 659.

For the convenience of the court, we are printing as an appendix in the back of this brief, respondent's brief and argument dealing with the various points raised on this writ which were contained in respondent's brief before the Supreme Court of Missouri in this cause.

III.

McCarthy Was the Employee and Servant of Petitioner and Petitioner Cannot Now Be Heard to Say That He Was An Independent Contractor.

Petitioner with little apparent confidence in its position now asserts that McCarthy was not its employee or servant at all, but was an independent contractor.

In the first place, the petitioner cannot be heard now to assert that McCarthy was not an employee. No such contention was made during the trial of the cause. On the contrary, petitioner conceded at the trial that McCarthy was its employee, and such was a part of its trial theory. Petitioner requested the court to give, and the court gave, instruction 4, on its behalf, as follows:

> "Even though the jury may find from the evidence that the defendant's officers and agents *employed one McCarthy* as an informer on car thieves and train robbers, and that prior to and at the time of such *employment* they knew that said McCarthy was a car thief, train robber, convict or ex-convict, *yet such employment by them of McCarthy* as such informer was not unlawful; and the defendant is not *by reason of such employment* liable for the act of McCarthy in accompanying Gladson and others in an attempt to rob the train on which David was train rider, nor for the act of said McCarthy in being present at the time and place of the fatal *shooting* by Gladson of said David."

Moreover, on the appeal of this cause to the Supreme Court of Missouri, petitioner assigned no error

of the trial court in submitting said cause to the jury on the basis that McCarthy was its employee and servant, and it will be noted by this court that the Supreme Court of Missouri in its opinion does not discuss this matter. On the contrary, the Supreme Court of Missouri in its opinion quotes from petitioner's brief as follows:

> "'It was admitted that David, when killed, was in the line of his duty, that his work was interstate commerce, and no question was raised as to the plaintiff being the administratrix of his estate. *The sole question presented in the trial court and pressed here is whether or not any negligence of the defendant was shown and if so, whether it was the proximate cause of David's death'* (Appellant's Brief)" (220).

It was not until petitioner filed its motion for a rehearing in the Supreme Court of Missouri that it even mentioned or suggested that McCarthy was not its employee.

Accordingly, the trial court and Supreme Court of Missouri will not be convicted of error concerning a matter on which they in a proper manner were not asked to pass and this question is not now open for review in this court.

> *Willoughby* v. *Chicago,* 235 U. S. 45, 35 Sup. Ct. Rep. 23.
>
> *Wall* v. *Chesapeake & O. Ry. Co.*, 256 U. S. 125; 41 Sup. Ct. Rep. 402.

Moreover, the testimony at the trial was full, ample and complete that McCarthy was an employee of petitioner. Mr. Boult testified:

"Q. What was the purpose of meeting McCarthy there at that time?

"A. Why he and Mr. Mitchell had been talking over different robberies that had happened on the road and we were figuring on *employing McCarthy*, I think, at that time.

"Q. Well, was McCarthy *employed* there on that date?

"A. He was" (39).

* * * * * * *

"Q. What salary did the company undertake to pay him, or wage?

"A. Well, it is one hundred and fifty dollars a month, at that rate, at the rate of one hundred and fifty dollars a month.

"Q. How frequently was he to be paid?

"A. Every month.

"Q. By the month?

"A. Well, yes, by the month, and if he wanted money, we would give it to him" (41).

* * * * * * *

"Q. Well, do you mean the plan was that he was to continue with this gang, Gladston, Loar, Hayes and others?

"A. His instructions were that he was to get us word before the robbery was committed, if he could, if not, to give us information as soon as he could after the robbery had been committed.

"Q. Who was he to report this information to?

"A. Myself.

"Q. Did you advise him as to how to reach you any time through the night or day?

"A. Through the telephone" (41).

* * * * * * *

"Q. Now, after McCarthy was *employed* did he report for duty to you or to anybody else at any particular place each day or week?

"A. At times he would call up on the 'phone when he wanted to give us any information" (43).

"Q. How long did McCarthy continue in the *employment of the railroad company* under your department?

"Mr. Hackney: As an informer?

"Q. Yes, as an informer.

"A. As an informer, well, I think until about June, 1923" (46).

Relating to how petitioner paid the wages of McCarthy, and train riders, and others in the inspection department, Boult testified:

"Q. How would the cash be transmitted to you?

"A. The cash would come to me in Mr. Mitchell's personal check for him (McCarthy) and the other men, made payable to W. H. Boult.

"Q. Did you pay all your informers in that manner by paying them cash?

"A. *I paid all men employed under me in that line of duty by cash*" (47).

* * * * * * *

"Q. Did you take any receipts from those men?

"A. Certainly, I did, I would protect myself.

"Q. You took a receipt from McCarthy?

"A. I did.

"Q. What did you do with those receipts?

"A. I sent them in to St. Louis to cover that check.

"Q. To show the disbursement you made?

"A. Yes, sir" (47).

* * * * * * *

Mr. Mitchell testified:

"Q. Was he (McCarthy) ever *employed as an employee of the railroad company at all*, by you or by anyone working under you?

"A. Yes.

"Q. Who *employed* him?

"A. I did.

"Q. And when did you *employ* him?

"A. Oh, in April, 1923, I think it was.

"Q. Do you know about the time; was it the 3rd or 5th—

"A. I think it was the 5th" (15, 16).

* * * * * * *

"Q. Where was he *employed?*

"A. Kansas City" (16).

* * * * * * *

"Q. And in what capacity did you *employ* him?

"A. As McCarthy; he was a thief at that time.

"Q. You didn't *employ* him for that purpose?

"A. I *employed* him as an informant" (16).

* * * * * * *

Mr. Barber testified:

"Q. Now, do you know Harold McCarthy?

"A. Yes, sir.

"Q. Did you know of his *employment* as informant by Mr. Mitchell and Mr. Boult?

"A. I had heard of it" (198).

* * * * * * *

"Q. You didn't advise anybody of the *employment of Harry McCarthy?*

"A. No, sir" (199).

* * * * * * *

"Q. You didn't know anything about the facts that McCarthy had been *employed* prior to David's death?

"A. Oh, yes; I knew he had been *employed* prior to David's death but I didn't have anything to do with it and I wasn't in on the matter at all.
"Q. How did you learn of his *employment?*
"A. I think from Mr. Boult or Mitchell, I forgot which" (200).

* * * * * * *

"Q. Did you know of any other thieves or robbers that were *employed* as snitches at the time of Mr. David's death?
"A. Well, there is generally a great many of those character of people *employed by different railroads,* as you don't employ a preacher to catch a thief" (201).

* * * * * * *

Mr. Boult's statement that they couldn't very well give McCarthy instructions about furnishing them information and what use he was to make of the information is not to be taken seriously because Boult makes the same statement as to instructions given to David and other train riders. He testified:

"Q. Where would they ride?
"A. That was left to their judgment, we couldn't just tell them where to ride" (35).

The substance of Boult's testimony in each case was that petitioner was hiring all these men for their judgment as to how to act under various circumstances, as much as for their services otherwise, which was not a criterion of their relationship with petitioner as being an employee or otherwise.

The court's attention is further called to the fact that petitioner is quite forgetful in its brief in this court of its present contention that McCarthy was an independent contractor and not an employee. Petitioner states: "That his sole purpose in so *employing McCarthy*" (B. 10); "that he did not advise other special agents, or train riders or any one of *the employment of McCarthy;* that *this employment* was kept secret; that it was not calculated to come to the knowledge of any of the company's employees outside of the *heads who employed him*" (B. 22). Also "he had nothing to do with *the employment of McCarthy*" (B. 23).

Petitioner states on page 36 of its brief:

> "Petitioner did not by the arrangement clothe McCarthy with any power or authority in its behalf to perform any duty which it owed to the public."

This statement of petitioner appears to be wholly without warrant in view of the fact that the testimony clearly shows that petitioner employed McCarthy for the purpose of ascertaining the operations of this gang of train robbers and reporting when and where they were to make depredations upon petitioner's trains, to the end that they might be trapped and caught and brought to justice, thereby putting an end to such depredations upon the property of petitioner and the property of shippers using petitioner's lines for the transportation of goods. Moreover, McCarthy was employed to furnish information as to the fences

or repositories for disposing of this property so that the property might be recovered and the robbers convicted and their gang broken up. In short, McCarthy was attempting to do under cover what David and other train riders of petitioner were doing openly, and they all worked with a common purpose of guarding, preserving and protecting the property of petitioner, and the public making use of petitioner's lines for transportation of goods. McCarthy was therefore performing a service which petitioner owed to its stockholders and creditors and to the public generally, and in every sense of the word was an employee. It was held by this court in *Baltimore & Ohio R. R.* v. *Burtch,* 263 U. S. 540, 44 Sup. Ct. Rep. 165, that a consignee of an interstate shipment of an agricultural implement, who assisted in unloading said agricultural implement at the instance of a railway employee was thereby rendered an employee of the railroad company and was entitled to recover under the Federal Employers' Liability Act for an injury which he sustained in assisting to unload the implement.

We believe that from the character of the testimony and the duties performed by McCarthy that his employment by the month at a specified wage clearly made him an employee of petitioner, even if petitioner had not tried the case on the theory that he was its employee.

Conclusion.

It is respectfully submitted that the judgment below was for the right party; that the Supreme Court of Missouri in its opinion herein has in no way departed from the rules of law long recognized and applied by this court, but, on the contrary, its decision here is entirely consistent and in accord with those rules of law, and that its judgment herein should be affirmed.

Respectfully submitted,

HORACE GUFFIN,
Attorney for Respondent.

EDMUND H. MCVEY,
SAMUEL R. FREET,
C. A. RANDOLPH,
LESTER G. SEACAT,
Of Counsel.

APPENDIX

ARGUMENT

(Brief Before Supreme Court of Missouri.)

I.

The defendant, through its agent and employe, McCarthy, actually knew for twelve hours before the robbery that it would occur at the time and place it did, and it owed David the primary and non-delegable duty of warning him of this unusual and increased danger, and by not warning David, it not only failed in the fundamental duty so to warn, but also thereby rendered the place in which David was working unsafe. Having failed in its duty, defendant is liable for David's death resulting from such breach.

This is an action under that part of the Federal Employers' Liability Act which authorizes recovery for injury or death "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier" (Sec. 51, Title 28, U. S. C.). No question is raised by defendant in regard to the nature of this action or the fact that David was engaged in interstate commerce at the time of his death (9).

The general rules applicable here are stated as follows:

> "If the master has knowledge that the particular employment is from extraneous causes hazardous or dangerous to a degree beyond what it fairly imports or is understood by the servant

to be, he is bound to inform him of the fact, and if he fails to do so, he is liable for such damages as the servant may sustain by reason of such causes" (39 C. J. 507).

"If the employer has actual knowledge of the danger, it is his duty to warn the servant thereof where the latter cannot, by the exercise of ordinary care, have discovered it" (*id.* 491).

"The duty of warning and instructing a servant is the primary duty of the master and the delegation of such duty to another servant, whether higher or lower in the scale of employment than the one exposed to danger, cannot relieve him of the responsibility imposed upon him by law, and nothing short of actual notice of danger to the workman who is to encounter it, will satisfy the requirement of the law; this rule applies with full force and vigor as to warning a young or inexperienced servant, *or warning a servant in regard to a new or increased danger, or to abnormal or extraordinary risks*" (*id.* 490).

"It is one of the legal duties of the master to give his servant warning of any extraneous and *unusual* danger to which he may be subjected; and if the master fails to use ordinary care to do so, and the servant is injured, the master is liable *because the injury did not flow from any risk assumed by the servant, but from the personal negligence of the master.* Nor can the master avoid liability by making it the duty of an agent to give such warning, and then, if it is not given, say that the negligence was that of a fellow servant. In such cases the maxim *qui facit per alium facit per se* applies as between the master and the servant entitled to the warning; and the servant or agent appointed to give the warning, no matter what his grade or rank in the general service of the master, becomes, for such purpose, the *alter ego* of the master. His act is the master's act;

his failure, the master's failure." 7 *Am. & Eng. Enc. of Law,* (2d Ed.) 417, and cases cited.

In the case of *Dixon* v. *Construction Co.,* (Div. 2, 1927), 318 Mo. 50, 298 S. W. 827, this court succinctly announced the legal principles applicable to this case, in this language:

> "The duty to exercise ordinary care to furnish the servant a reasonably safe place in which to work is the primary and non-delegable duty of the master. This duty has been imposed upon the master for the protection of the servant, who has a right to rely upon its performance. The master must from time to time inspect the place of work to see that it remains in a reasonably safe condition and to so maintain it. However, if the servant knew or by the exercise of ordinary care could have known that the danger or defect was obvious, open, apparent, imminent and hazardous he could not rely upon the rule. *And that the place of work is of unusual danger, does not affect the operation of this rule, for the servant may assume that it is as safe as the master can make it by the use of ordinary care and diligence, and that the master will not expose him to hidden or concealed dangers, without warning, discovered or discoverable by the use of ordinary care* (39 C. J. 827)."

The application of these familiar rules to situations where the master knew, actually or constructively of the existence of an imminent danger from intended felonious and violent acts of third parties are rare. Where, however, the courts have had occasion to pass on such situations, they have uniformly and without qualification, sustained liability for the injurious results which followed when the master, know-

ing that violence might reasonably be anticipated, failed to warn his servant thereof.

The leading case in this country on this subject is that of *Baxter* v. *Roberts,* 44 Calif. 187, 13 Am. Rep. 160. In that case, the defendant, Roberts, was having trouble with a neighboring lot owner over a fence. He employed the plaintiff, Baxter, a carpenter, to go upon the premises to do some work on the fence. He knew, but failed to tell Baxter, that any interference with the fence might be resisted by force. Baxter proceeded with the work, and was shot in the shoulder. The case was submitted to the jury upon substantially the same theory as that under which this case was submitted, and a judgment for the plaintiff was affirmed, the court saying:

> "That one contracting to perform labor or render service thereby takes upon himself such risks, and only such as are necessarily and usually incident to the employment, is well settled. Nor is there any doubt that if the employer have knowledge or information showing that the particular employment is from extraneous causes known to him hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employee to be, he is bound to inform the latter of the fact, or put him in possession of such information; these general principles of law are elementary and firmly established. They are usually applied to cases in which the employee has sustained injury by reason of some defect or unsoundness in the machinery or materials unknown to him about which he is employed to perform labor, and of which the employer knew or might have known in the exercise of ordinary care and vigilance on his part. The general principle which

forbids the employer to expose the employee to unusual risks in the course of his employment, and to conceal from him the fact of such danger, is not affected by the fact that the danger known to the employer arose from the tortious or felonious purposes or designs of third persons acting in hostility to the interests of the employer, and through agencies beyond his control. The employee is as clearly entitled to information of such known danger of that character as of any other the existence of which is known to the employer. The employer, if he knew or was informed of a threatened danger of that character, was bound to communicate the information to his employee about to be exposed to it in the course of his employment and in ignorance of its existence. The nature or character of the agency or means through which the danger of injury to the employee is to be apprehended can make no difference in the rule, for *the employee is entitled, in all cases, to such information upon the subject as the employer may possess, and this with a view to enable him to determine for himself if, at the proffered compensation, he be willing to assume the risk and incur the hazard of the business;* and if the employer have such information or knowledge and withhold it from the employee, and the latter afterward be injured in consequence thereof, the employer is liable to him in damages therefor."

In the case of *Holshouser* v. *Denver Gas & Electric Company,* 18 Colo. App. 431, 72 Pac. 289, the defendant had a strike on its hands in which the strikers were very aggressive, and threatened violence to those employed to take their positions. Plaintiff was employed as a stoker, and claimed not to be aware of the existence of the strike or of the angry temper of the defendant's employees. He worked for some eighteen

days when he was fired upon by some of the strikers, shot and disabled. A judgment sustaining a demurrer to the petition was reversed. In the opinion, the court commented on the case of *Perry* v. *Marsh,* 25 Ala. 659, where, the opinion states, it is said that:

> "If one employs a workman in a service which is apparently safe, but which becomes hazardous from causes disconnected with the service, which are not discoverable by the exercise of ordinary prudence, *he is bound by the strongest principles of morality and good faith to disclose the danger, if known to him; and the failure to make such disclosure would be a breach of duty for which the employer would be held responsible if, while engaged in the work, the workman sustained an injury.* This rule has been applied to a variety of facts; and, so far as our research has extended, it is uniformly held that in inducting employee into an employment which involves exposure to some invisible danger, no matter what the cause or nature of the peril may be, the employer, to escape responsibility, must impart to the employee his own knowledge of the situation" (citing cases).

The court then likens this situation to those in which the employee is exposed to some harmful and hazardous property inherent in the material with which he works, known to the master and unknown to him, and by which he is injured (see *Mooney* v. *Monark Oil & Refining Co.,* (Div. 1, 1927) 317 Mo. 1255, 298 S. W. 69).

In the *Holshouser* case, an attempt was made to distinguish it from *Baxter* v. *Roberts,* upon the theory that the shooting in the *Baxter* case occurred upon an invasion of the premises of another, while in the former

case the attack occurred upon the defendants' own premises and the assault was delayed for some time. The court commented thus on this theory:

> "We do not conceive this difference to be important. It strikes us that the degree of danger to be apprehended from exasperated men is not safely measurable by the cause of the exasperation. The destructiveness of firearms in the hands of persons determined to use them is the same, whatever the grievance or fancied grievance may be by which the murderous disposition is excited. *The controlling feature of both cases is that the employer knowingly exposed the employe to personal danger, and concealed the danger from him.*"

The case of *McCalman* v. *Ill. Central R. R. Co.*, (C. C. A. 6th C. 1914) 215 Fed. 465; is another strike case. Judgment for defendants was reversed and the case remanded. McCalman was a railway guard during a strike. A restraining order had been granted by a Federal Court to prevent interference with the movement of interstate commerce. For this reason a force of deputy United States marshals was operating in the same locality as was the plaintiff. The officer in charge of the railroad guards was apprehensive of violence during the night at the Horn Lake Road crossing, but thought that he and his guards could take care of the situation. He, with McCalman and another guard, went to the crossing, and joined some other guards who were there. The officer remained a couple of hours, ordered the guards to remain there until midnight and left. About ten o'clock the Special

Agent's Department was warned by telephone that trouble was brewing, and a call was put in for deputy marshals. Several were started from Memphis on a switch engine. When this engine arrived at Horn Lake crossing, the railroad guards mistook the deputy marshals on the engine for strikers, and the deputy marshals mistook the guards for strikers. Both sides opened fire, and McCalman was hurt. Circuit Judge Warrington states the rules applicable to that situation in this language with citations of cases which are here omitted:

> "It is a general rule as respects any hazardous occupation that the master shall inform his servants of all perils to which they will be exposed, *which are or should reasonably be known to him,* except such as are obvious to the servants or through the exercise of ordinary care on their part may be foreseen and in either event injury therefrom reasonably avoided" (citing cases).
>
> "And the duty so imposed upon the master is of a primary character and is therefore non-delegable."

Judge Warrington further stated that:

> "The chief danger rationally to be apprehended lurked in the telephone message, 'There was trouble at Nonconnah,' and the deputies approached the crossing with that belief. The nature of the danger, if under all the circumstances it was one reasonably to be anticipated, did not lessen defendant's duty to McCalman; for *knowledge of these new conditions would have enabled him to decide whether to remain at the crossing or discontinue his service.*"

In the case of *Telephone Company* v. *St. Clair*, (C. C. A. 2nd C. 1909) 168 Fed. 645, a lineman was *electrocuted when he came in contact with some live wires,* which he did not, but his employer did, know were carrying current. The court said:

> "Well settled principles of law determine the conclusion. It is the duty of the master to use reasonable care in securing the employe a reasonably safe place to work, *and to be reasonably careful in warning the servant of any special and particular dangers incident to some particular locality about which the master is advised or should be advised, if he has been reasonably careful;* that precise definition of the word 'reasonable,' varying, of course, with the circumstances of each particular case."

Or as succinctly defined by the court in *Ry.* v. *Hall*, 243 Fed. 82:

> "The employer's duty requires information to his employee of all perils which should be reasonably known to the employer, *and of any change which introduces a new element of danger.*"

The application of these plain "principles of morality and good faith" seems almost unnecessary. In large measure they are self applying and need little more than a complete statement of the facts to compel the conclusion that the defendant's liability in this case is clear and unavoidable.

Here was a change which certainly introduced a new element of danger, the definite planning of a robbery at a predetermined time and place. The court used the word "imminent" in the Dixon case, and it

fully describes the change, for common sense demonstrates the difference between dangers which are imminent and contingent. It was "a special and particular danger incident to a particular locality about which the master was advised." And, in the McCalman and Baxter cases, the reason given why the employee is entitled to such information as the employer has of new conditions affecting his safety is to enable the employee to decide whether to remain at his post or discontinue the service. Elsewhere in this brief, the events leading up to Mr. David's death as shown by this record have been reconstructed to show that in the performance of his regular duties he was shot from ambush without a chance to defend himself. Under the circumstances shown in evidence it would have been a simple and easy matter for him to have avoided this, had he known when the train pulled onto the siding at Leavenworth that desperate men were in waiting.

What this man was deprived of by McCarthy's failure to report was his elemental right to protect his life with the means at hand. That he would have exercised that right with ordinary care and prudence in the light of all the attending circumstances the law presumes. And he who denies him that right takes on himself the responsibility for the consequences which follow. The defendant suggests that there might have been a quarrel, an altercation, a provocation. But the court, in the Holzhauser case, says that "it strikes us that the degree of danger to be apprehended from exasperated men is not safely measurable by the cause

of the exasperation." And in the Lowrey case, cited by the defendant (Br. p. 26) it is said that "it should be naturally expected that a thief breaking into a car to steal, usually and ordinarily will resort to violence to prevent detection and detention or arrest."

If there was an altercation or provocation, Mr. David had a right to know the character of the man with whom he was dealing if the defendant knew it. And he had a right to avoid, if he chose, the "thief breaking into a car to steal" if the defendant knew he was a thief. He was deprived of this right and he was killed.

It comes with poor grace, it seems to us, for the defendant to say now that Mr. David's "unfortunate death" did not result "in whole or in part from the negligence" of McCarthy in failing to report so that it might have warned him in time to have given him an opportunity to protect himself.

Furthermore, it was the defendant's duty to Mr. David to exercise ordinary care to see that the railroad yards in Leavenworth where this train stopped constituted, even under these unusual circumstances, a reasonably safe place for him to examine the seals on the car doors and see that everything about the train was all right. This was a duty which the law imposed upon the defendant for Mr. David's protection and he had a right to rely upon its proper and reasonable performance.

It would have been a simple matter in this instance to have accomplished all the rule requires and expects, had the information, which McCarthy carried

with him for twelve hours before the tragedy occurred, been transmitted through the day-and-night telephone service which those directly responsible for Mr. David's protection had carefully arranged. When at five o'clock one evening, a short time before, McCarthy informed Mr. Boult of an intended attack on an undesignated train at Kenneth Tank, Kansas, Mr. Boult gathered together five armed men from the company's force and covered the point all night and warned all train riders who passed there (43). When news of Mr. David's death reach Kansas City, four special agents in the company's service were quickly collected and rushed to Leavenworth, by automobile (48). It is not a matter of speculation or conjecture, but a conclusion based upon common knowledge and experience to say that if Mr. Boult had had as much information on this Leavenworth affair as he had on the one at Kenneth Tank, as late as the time the train left Kansas City at ten o'clock, or even later, with his own force which could have reached the scene in an hour or two, and that of the police and peace officers of Leavenworth and Leavenworth County, they could and would have mobilized a veritable army and concentrated it at the time and the place where the gang had agreed this train was to be boarded. Had they done so, and the exercise of ordinary care for the protection of the train crew would have dictated it even if their own desire to do their duty had not—this bandit car would not have waited quietly for an hour and a half on a little creek bridge near an old

sugar refinery in the southeastern section of Leavenworth about a half a block from the Missouri Pacific tracks (126). Either the officers would have intercepted the gang as Mr. Mitchell said they would do upon receiving such information (20) or the bandits would have found the place "too hot" and abandoned the venture (see Mrs. Riley, 169).

This duty to provide security is said to be nondelegable. As between Mr. David and the defendant, in connection with McCarthy, the maxim *qui facit per alium facit per se* applied and by careful selection and well laid plans, McCarthy became the *alter ego* of the Chief Special Agent of the defendant and as close to the service "day and night" as the nearest telephone. His act was the defendant's act; his failure the defendant's failure.

It can not be said either that this resort to the ancient police device of espionage was altogether gratuitous so far as Mr. David was concerned or confined in its object and purpose merely to the apprehension and conviction of these persistent criminals. Under circumstances where the hazard is mechanical, the master is in duty bound to inspect the place from time to time to see that it is reasonably safe and so to maintain it. The character of the inspection must of necessity vary with the situation to be inspected and be directly related to the anticipated danger. The anticipated danger here was this organized gang of box car robbers, who were known to be utterly indifferent, to taking human life in furthering their ends. The propriety of investigating the gang's

activities and attempting to learn in advance where next it would strike was as plainly indicated under these circumstances as the necessity for constant inspection of the safety devices on a railroad engine. The employment of a stool-pigeon in the fulfilment of this salutary obligation of the employer may seem to be (and so far as we can find in the decisions and books it is) an unusual and novel procedure, yet the record discloses and common knowledge informs us that it is by no means an uncommon expedient in railroad and general police service (see Barber, 199). Fundamentally there is no difference between an informant and an inspector, and certainly the fact that the Chief Special Agent and his far flung organization knew who made up this gang, knew their haunts and habits, and knew the potentialities existing in their activities for injury and death to the operating personnel on its trains, would suggest, if it would not absolutely demand, within the rule of reason and ordinary care, that at all times it and its members be under some form of observation. The means of execution may have been novel, but the object and end of the duty were the same here as in the usual case calling for inspection.

The defendant contends that the employment of McCarthy was a voluntary act of the company, not known by David or contemplated by him in accepting the employment, so that if it proved ineffective, the failure cannot be made the basis of liability, and defendant cites the case of *St. Louis & San Francisco Ry. Co.* v. *Mills*, 271 U. S. 344, 46 Sup. Ct. Rep. 520.

The distinction between the Mills case and this case accentuates rather than minimizes the defendant's responsibility for the negligence of its secret agent, McCarthy. In the Mills case plaintiff was a car inspector during the strike in 1922, and while returning from work to his home on a street car, in company with a deputy sheriff employed by the company as a guard he was shot to death by strikers. *Mr. Justice* Stone included these pertinent and distinguishing facts in the opinion:

> "The undisputed evidence is that the shooting was done by one or more of three men standing on the rear platform of the car. They had come there after decedent and his companion had seated themselves in the car. *Without warning,* they fired a volley into the car and fled. Decedent and his guard were armed, *but had no opportunity to defend themselves.*"

There is a vast difference between the duty which an employer owes to an employe when the latter is working in line of his duty and when he is not. As *Mr. Justice* Stone points out, there was no common law duty on the part of the company to guard the strikebreakers while not in the employer's service or on his premises, and hence the protection afforded was purely a matter of contract.

Furthermore, there is no intimation in the *Mills* case that the company knew or had any more than a general reason to believe that decedent and his guard would be attacked on that particular car and at that particular time. On the contrary, they were fired upon without warning. Suppose the evidence had

shown that the company actually knew, by any means or agency whatsoever, that three men would get on the rear platform of that car after decedent and his guard had seated themselves, and without warning would fire a volley into the car, and, so knowing, had allowed the decedent and his single guard to submit themselves without warning, to this murderous assault, is it conceivable that by its decision the Supreme Court of the United States would have denied plaintiff's recovery?

But that still is not this case: Suppose the company had known, by any means or agency whatever, that this murderous assault would be made at a certain time and place, while the decedent was in the performance of his duty at the place of work to which he had been ordered by the defendant, and it had failed to warn him or take any steps whatsoever for his protection, is it possible that the Supreme Court of the United States would have denied liability because warning and external protection were only voluntary and not required by the law? Manifestly not! That court predicated its decision in the Mills case upon the sound premise that the company owed Mills no duty to see him safely home. Here the company owed Mr. David the elementary duty, taken from the very heart of the common law, to exercise ordinary care to see that the place of work into which it ordered him was reasonably safe, and that he was warned of perils known to it and not known to him.

The two cases are further distinguishable in this way: The means adopted in the Mills case proved

inadequate for the purpose—that is of effectively guarding the workmen, and the court held that mere inadequacy of gratuitous means could not constitute negligence. The means in this case were amply adequate. McCarthy completely fulfilled his mission by procuring the very information which Mr. Mitchell sent him to get. The failure of the means to accomplish the complete protection of Mr. David's life, was not due to any inadequacy or want of power or capacity, but entirely to the negligence of McCarthy, the agent. It was not his inadequacy, but this negligence in his failure to fulfill the definite and specific instructions given him by Mr. Mitchell and Mr. Boult that resulted in Mr. David's death.

II.

David did not assume the risk of the attack by the robbers as one of the usual and ordinary hazards of his employment, for the reason that this was an unusual and imminent risk existing at the time David was killed, known to the defendant through its employe McCarthy, and unknown to David, and defendant is liable for the negligent failure of McCarthy to report the information so that it might be passed on to David.

It cannot be said that this was one of the ordinary risks of the work, so that Mr. David's dependents must absorb the burden of their loss as part of the bargain made at the hiring. Under the test in the *Dixon* case the master is relieved of his duty and the burden is assumed by the servant when the servant knows or by the exercise of ordinary care could know that the danger "was obvious, open, apparent, *imminent* and hazardous."

Mr. David's position was a difficult one. He was selected by Mr. Barber as a man of "good judgment." Whenever the train stopped it was his duty in the dark to examine the seals on the car doors and see that they were intact, and that the train was all right. He came in contact with the train crew necessarily. He also frequently encountered tramps and other innocuous trespassers whose presence, though undesired perhaps, carried with it no threat of violence (184). Obviously it would be somewhat difficult to discriminate readily enough to insure protection in case of a sudden attack between those who deserved a quick shooting and those who did not. This was a circumstance which increased rather than lessened Mr. David's peril.

The defendant would have the court believe that he was hired to do or die without question and to shoot it out with the robbers whenever he came upon them. The testimony does not bear this out, and common sense suggests that the chief special agent did not expect a train rider singlehanded to do so Quixotic a thing as attempt to drive off a concerted attack of a dozen armed and determined desperadoes who would shoot on sight or that he "would fight them until he died," unless necessary for his own protection. Quite the contrary.

Mr. Boult testified that the train riders had no instruction, one way or another, about going armed and if they had firearms they provided them themselves, and that by all means they were not to get hurt if they could prevent it. Mr. Barber, who hired

him, said that he told Mr. David that he had to be very careful. The sergeant told him to watch his step.

Plaintiff is not minimizing the fact that Mr. David's job was a perilous one, but the peril, at the time he was killed was not and could not have been known by him, as the circumstances clearly show, to have been imminent. It was everything else but "obvious, open and apparent." So far as he knew he was exposed to no more than the possibility that he might, at some time and place, meet these bandits, who had been operating at irregular times and at widely scattered points along the system. The policeman on his beat, the sheriff in his county and the law's officers generally are similarly exposed to hazards not ordinarily assumed by persons in other walks of life. But the chances are much greater that they will never meet with violence than that they will suddenly be shot down without a chance for defending themselves. In the six weeks or more that David had been engaged as a train rider, the record shows that only once had his train been attacked and at that time, he was not on it. Indeed, the chances were very much in favor of the possibility that the train would never be held up, and certainly he had no more reason than Mr. Boult did (57), to believe that on that particular night at that particular time the gang would bring its deadly work home to him.

The defense stresses the fact in this connection that when Mr. David left Kansas City and at the time he was killed he was armed with a revolver and a sawed off shotgun. But they studiously avoided show-

ing whether at the time they were needed these arms were at the "ready" or "carry" positions. So far as it is necessary to do so here it is not difficult to reconstruct the circumstances leading up to the killing without resorting to testimony given by the man, who, the defendant admits, killed Mr. David, on the trial where he was convicted and sentenced to life imprisonment, testimony which was introduced in this trial for impeachment purposes only.

When the train stopped in Leavenworth on the siding, Mr. David was riding the engine, and Mr. Dougherty, the conductor, and Mr. Boyd, the other train rider, were in the caboose. These two men proceeded forward between the train and the main line track which would be on the side away from the right-of-way. Mr. David when he was killed, about ten minutes after the train stopped, was between twenty and twenty-five car lengths from the engine, proceeding back along the train, presumably inspecting it. It is significant that Mr. Dougherty, who was walking toward Mr. David and was only four or five car lengths away did not see him shot and saw no flashes. In other words, his attention had not been attracted to Mr. David by sight or sound and the shots did not come from the ground or the top of the train where they would have been seen. Mr. David was shot from above into the chest and was dead when they reached him. Gladsen and McCarthy had boarded the train before it stopped from the road on the right-of-way side. That they were careful not to attract attention was to be expected. Gladsen perched upon

the drawbar or sills between two of the cars, covered the exposed area along the train with his gun and fired two quick shots when Mr. David came into view. The gang had done exactly what the special agents had predicted it would do. It had shot on sight—indeed without sight and from ambush. Of course, Mr. David was armed. He had a revolver and a sawed-off shotgun. But he might also have had a saw-toothed bayonet and a sack full of hand grenades for all the good any of them would have done him when, unmindful that death was at hand, he stepped past the end of that last car.

This leads to the decisive rule in this case as stated in the *Dixon* decision.

> "That the place of work is of unusual danger, does not affect the operation of this rule, for the servant may assume that it is as safe as the master can make it by the use of ordinary care and diligence, and that the master will not expose him to hidden or concealed dangers, *without warning*, discovered or discoverable by the use of ordinary care."

When Mr. David stepped into Gladsen's ambush, he did so on the assumption that the defendant had exercised ordinary care and diligence under even the unusual circumstances existing here to see to it that Gladsen was not there and with the assurance that the defendant would not knowingly expose him to this completely concealed deadly danger without warning. He could act as he had acted for six weeks, on the theory that since he had not been notified otherwise,

he knew just as much about his chances as the company did.

When the train stopped in the yards at Leavenworth that night and it became his routine duty to inspect it, Mr. David had the right under the law, as declared in the *Baxter* and *McCalman* cases, *supra*, to determine for himself, while he was yet in a place of safety, whether, for $135.00 a month, he was willing to face the risk and incur the hazard which was then known by the defendant then to exist, and meet Gladsen face to face. In making this decision, he did not have to quit his job and leave his employer in the emergency. Under his instructions and orders, he had the further right to adopt all of the means available to him to avoid getting hurt if he could prevent it. His superiors had instructed him to be very careful for himself and to watch his step, and he had the right to do that intelligently. In the exercise of that right, he was entitled to use his own judgment and act with such information about the danger he would encounter as the defendant could furnish him.

As the court said in the *Holshauser* case, the controlling feature of this case is that the defendant knowingly exposed Mr. David to personal danger, and concealed it from him. That which had been a general, contingent hazard of the service, unrelated to time and place, had become a specific certain peril of a fixed time and a predetermined place, which were, for twelve hours known to defendant's *alter ego* McCarthy and would have been known to Mr. David had Mc-

Carthy availed himself of his opportunities and reported as he was instructed and ordered to do.

However hazardous the occupation may be the risks necessarily fall into no more than four classes: (1) Those known by both parties; (2) those known by neither party; (3) those known by the servant and not by the master and (4) those known by the master and not known by the servant. It would be a complete perversion of the whole rationale of the doctrine of assumed risk to say that it applied in any case of the latter class.

> "Ultimately the question (of assumption of risk) becomes one of comparative knowledge; if an employee is in as good a position as his employer for ascertaining and understanding the situation, and equally well knows and appreciates the conditions, he cannot be allowed to complain for injuries sustained by working therein. • • • Conversely, it is held that assumption of risk does not cover those unseen and obscure dangers which cannot reasonably be discerned by an employee and which the employer properly may be held to know about (18 R. C. L. 685, 686).
>
> "Whenever the employer from the standpoint of knowledge is in a position superior or dominant to that of the employee, the latter may rely for his safety on the activity of the employer. One who employs others in a business or industry that is known to be dangerous is charged with care reasonably commensurate with the perils to which his employees may be exposed in the discharge of their duties, and he impliedly contracts with each employee that he will fulfill his obligation. The employee may rely upon the performance of his duty" (*id.* 690, 691).

In the case of *Chicago & Northwestern Railway Co.* v. *Bower*, 241 U. S. 470, 36 Sup. Ct. 624, the court said:

> "There was present, therefore, an extraordinary danger, not normally incident to plaintiff's employment; it was in its nature latent, and not obvious; and there is no evidence in the record that plaintiff had received any notice or warning of the increased hazard attributable to his employer's negligence. In short, while he knew there were certain dangers naturally incident to the use of tubular glasses upon the lubricator, there is nothing to show that he knew or had any ground to believe that his employer had been wanting in the exercise of proper care for his safety, or that because of such want of care the danger to him was greater than it ought to have been. Without this, he could not be held to have assumed the increased risk. *Gila Valley, G. & N. R. Co.* v. *Hall*, 232 U. S. 94, 101, 58 L. ed. 521, 524, 34 Sup. Ct. Rep. 229; *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 504, 58 L. ed. 1062, 1070, L. R. A. 1015C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834. Judgment affirmed."

And again in the case *Chicago, R. I. & P. Ry. Co.* v. *Ward*, 252 U. S. 18, 40 Sup. Ct. 275, the opinion succinctly states the position of that court on the matter of assumption of risk in this language:

> "As to the nature of the risk assumed by an employe in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & Ohio Railway Co.* v. *De Atley*, 241 U. S. 310, 315, 36 Sup. Ct. 564, 566 (60 L. Ed. 1016):
>
> > 'According to our decisions, the settled rule is, not that it is the duty of an employe to exercise care to discover extraordinary dan-

gers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.'

The Federal Employers' Liability Act places a coemploye's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U. S. 313, 36 Sup. Ct. 564, 60 L. Ed. 1016. See also *Chesapeake & Ohio R. Co.* v. *Proffitt*, 241 U. S. 402, 468, 36 Sup. Ct. 620, 60 L. Ed. 1102; *Erie Railway Co.* v. *Purucker*, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166."

(See also *Clift* v. *Railway Co.*, (Div. 2, 1928) 320 Mo. 791 l. c. 799).

When Mr. David arrived in Leavenworth the night he was killed, he had a right to assume that the defendant, through its chief special agent's department, whatever its ramifications may have been, had exercised proper care with respect to his safety. How they did this was a matter of indifference to him. The chief special agent might rely on his own detective force, on underworld tips, on public police departments or on stool pigeons. Until and unless he was notified to the contrary, Mr. David could rest on the assurance that while he may have been confronted with unknown perils, he was not being subjected to those known to his superiors. And he assumed those risks and only

those risks of which he and his employer were in equal ignorance. It was unfortunate that David's superiors did not know of this new peril. That circumstance was due directly to McCarthy's failure to do his duty and report as he was ordered to do upon obtaining the information that the gang would attempt to rob Mr. David's train at Leavenworth that night. Did Mr. David or the defendant assume the risk of McCarthy's neglect? Under the language of the court in the Ward case, Mr. David assumed that defendant had exercised proper care with respect to his safety until notified to the contrary. Hence, the defendant and not Mr. David assumed the risk of McCarthy's negligence.

III.

There was ample evidence that McCarthy had plenty of opportunity with safety to himself to communicate with defendant after the plans were made for this robbery.

But, the defendant contends, there was an absolute failure to prove that McCarthy had an opportunity "without uncovering himself" to his associates to communicate with Boult after the final plans were made to rob this particular train (Br. 32).

We know of no rule of law that would relieve defendant of the duty to warn David merely because McCarthy did not want to "uncover himself." The trial court properly submitted the issue to the jury on the theory that if McCarthy could have communicated his information "with safety to himself" then plaintiff should recover. But even on defendant's own theory

there was ample time for McCarthy to have communicated with Boult without "uncovering himself."

Both Mr. Mitchell and Mr. Boult testified that arrangements were made for McCarthy to get in touch with Mr. Boult by telephone at any time he might want to through the day or night (15, 16, 30, 39). And McCarthy had used the system (41). While in front of the court house in Kansas City, Kansas, during the noon hour McCarthy knew that it was agreed that the gang would go to Leavenworth that night and rob the merchandise train that reached there about one-thirty in the morning, the same train that had been robbed at the same place a number of times before (61, 62, 74, 64, 118, 126). During the afternoon the gang, including McCarthy, were about the court room as spectators (116, 117). When court adjourned they gathered at a rendezvous in Armourdale, a part of Kansas City, Kansas, and the personnel of the expedition was agreed upon. That was about six-thirty (64, 65, 168-170). They then went to a restaurant in Armourdale to eat supper and from there drove to the intersection of Seventh and Minnesota, in Kansas City, Kansas, which any Jackson County jury knows is the principal corner in that populous center (120-121). Here McCarthy left the two confederates with whom he had been riding, went alone to a drug store more than a block away and was separated from his associates seven or eight minutes (122). This is significant, not only to show a specific opportunity to report, but to show that McCarthy was under no suspicion, or restraint of any kind that would interfere

with his absenting himself from his associates long enough to make a local 'phone call. After that and for at least two hours, he went from place to place in Kansas City, Kansas, similarly to all intents and purposes free to do as he pleased and with every opportunity to make an occasion when he could report to Mr. Boult. The general information of a Jackson County jury would also encompass the fact that at no time from the time the plot was hatched at noon until the gang finally left Kansas City, Kansas, at ten o'clock, was he ever out of the direct telephone range of the central office serving greater Kansas City. He was not even embarrassed at any time with the necessity for putting in a long distance call. Certainly it was a fair inference for the jury to say that under these circumstances he had plenty of opportunity to communicate with Mr. Boult "with safety to himself" after he knew that the gang intended to make this particular train when and where it did. McCarthy might have denied it. But he did not appear at the trial.

IV.

Defendant's authorities are distinguishable and not in point.

Confronted though the defendant was under the instruction given by the trial court with the simple theory upon which this case was submitted to the jury, the defendant has nevertheless avoided any discussion or citation on the proposition that Mr. David was entitled to the benefit of any information

which the defendant or its servants had, and that the defendant is liable for failure to warn Mr. David of the imminent and impending danger at the time. Consistently, also, the cases which defendant cites are not cases in which there occurred this element of surprise to the workman, and want of warning.

In the case of *Thomas* v. *Missouri Pacific Ry. Co.*, 109 Mo. l. c. 200 (1891), there appear quotations from Thompson on Negligence and Sherman & Redfield on Negligence, stating the general rule with respect to the assumption of risk in occupations ordinarily and extraordinarily hazardous. The question arose in this case out of the relative rights and duties between switchmen and railroad companies in the handling of foreign cars, the case going back to those remote days before car coupling was standardized by national legislation.

The case of *Joyce* v. *Wooster*, (1885) 140 Mass. 345, 4 N. E. 565, was a sewer ditch case, likewise laying down the general rule that the servant assumes the extraordinary risks of an extraordinarily dangerous job when he fully knows about them.

The case of *Vestner* v. *Northern Calif. Power Co.*, (1910) 158 Cal. 284, 110 Pac. 918, is cited here as authority for the general rule of assumption of risk. This was an action under a California statute involving an injury to a workman when a tree fell with him in it. As we read the opinion, the decision against recovery in that case was predicated upon the fellow servant doctrine, and not upon the assumption of risk

doctrine. Under the Federal Employers' Liability Act, of course the fellow servant doctrine has nothing to do with this lawsuit.

The case of *Lowrey* v. *Atlanta Joint Terminals*, 145 Ga. 782, 89 So. 832, involved injuries to a railroad detective injured in the yard by thieves. There was in this case no evidence of any lack of parity between the knowledge of the detective and that of his employer. The court uses one sentence in the opinion to state a natural truth which was as binding upon the company here as it was binding upon Mr. David.

> "It should be naturally expected that a thief breaking into a car to steal, usually and ordinarily will resort to violence to prevent detection and detention or arrest."

Whatever may have been the specific reputation of the Gladsen gang, as it was known to the Special Agent Service of the Missouri Pacific, they could naturally expect thieves to resort to violence if accosted in their work. Hence, they could forsee the result that did follow when David, unsuspecting the character of the trespasser, came upon Gladsen.

Atlantic Coast Line v. *Southwell*, 272 U. S. 64, 48 Sup. Ct. 25, does not touch this case top, side or bottom, except that it was a death case under the Federal Employers' Liability Act. The death resulted in a personal altercation and was described in the syllabus as being wilful murder. Liability was predicated upon the theory that a general yard master, who was present, might have prevented it if he had forseen

the fatal consequence, which Mr. Justice Holmes said was unreasonable to expect of him under the circumstances. This is quite a different situation than that existing in the case at bar. At best the yard master was not more than an innocent bystander, who was unable to foresee that hot words between two men would result in the death of one of them. In the case at bar the *alter ego* of the defendant was a duly commissioned observer, duty bound to report, and quite conversant with the almost certain possibility that Mr. David, the train rider, and indeed all the members of the crew, would be exposed to violence if and when they encountered Gladsen's gang in the execution of a definitely planned robbery.

In *Manwell* v. *Donrst*, 178 Cal. 752, 174 Pac. 881, 1 A. L. R. 669, a man was killed during a strike of hop-pickers on a California ranch. He seems to have been a part of a sheriff's posse organized to preserve the peace during the strike. In affirming a judgment sustaining a demurrer to the petition, the California court held that there was no showing of negligence. The court distinguishes that case from the *McCalman*, *Baxter* and *Holshouser* cases cited above, on the theory that in each of those cases there was an element of concealment from the employee of facts relating to the perilous nature of the employment, due to special circumstances of which the employee was ignorant.

In a note at the end of this case, it will be observed that the editors were able to find only three strike cases in this country, the *Manwell*, *McCalman*

and *Holshouser* cases. In two out of those three cases recovery was allowed.

Feaster v. *Southern Pacific Ry. Co.*, (C. C. A. 4th C. 1926) 15 Fed. (2nd) 540, was a case involving the death of a deputy sheriff hired as a guard of railroad property during the strike in 1922. In some ways this case comes nearer being similar in its facts to the case at bar than any of the cases cited by the defendant. In the important and relevant particulars, however, the situation was precisely contrary to that which here exists. Very little was told of the decedent's murder. Apparently he was shot by strikers or their friends and sympathizers, but it was not known who had anything to do with it. Five men were indicted, but acquitted.

> "For all it appears he might have died as and when he did had the railway supplied a host of guards and armed them with every instrument of death which modern science is able to provide."

In the case at bar, Mr. David's murderers were known to the defendant before and after his death. Gladsen, who killed him, was sentenced to life (the maximum in Kansas) on the testimony of McCarthy who knew twelve hours before the death when and where the violence would occur. The defendant in this case did not prove or attempt to prove that at the time its force was not adequate to have intercepted, overpowered and incapacitated three known bandits bent on robbing the train at a particular time and a particular place. Certainly it would not have taken a host of

guards or any armament beyond the usual side-arms of an ordinary peace officer, to have prevented this unfortunate casualty.

The case of *St. Louis & San Francisco* v. *Mills*, has been heretofore commented upon. It is subject to the same distinction. The parties there were in equal ignorance of the impending calamity.

Conclusion.

The primary obligation of the company to warn Mr. David and give him the advantage of every bit of information it had with respect to the hazards he would encounter seems to us so obvious as not to allow of any doubt. The defense predicated upon the harsh doctrine of the assumption of risk seems to us entirely specious and in no way applicable under the facts here existing. We can see no difference between an informant, call him stool-pigeon, snitch or what-not, in his relation to the rest of the service, and particularly those individuals whose duty takes them out on the firing line of the service, and the car inspector and track walker in their relations to the operating personnel of the trains. McCarthy was the agent and employee of the defendant. The jury has found upon evidence fully justifying the finding that he was negligent and that Mr. David's death resulted therefrom. This is a literal fulfillment, therefore, of the statute enacted by Congress for the protection of Mr. David's dependents, fixing liability upon the defendant when an employee's death results in whole or in part from the negligence of its agents and employees. The

plaintiff, his widow, has recovered in a fair trial without prejudice to the defendant, and that recovery should be affirmed.

There is another unusual situation in this case. In no other case in our experience has an injury or death from negligence resulted in a direct pecuniary benefit to the defendant. In this case the company was concerned about its losses from the operations of the gang of thieves by whom Mr. David was killed. Predicating murder charges upon his death, the company was able, with the help of its informant, McCarthy (for which they rewarded him by interceding for his liberty after a conviction of robbing their freight cars had been affirmed by the Kansas Supreme Court) to put Gladsen away for life and Hayes and Loar for long stretches, and thus ridded itself of this menace and source of loss. Whatever may have been McCarthy's fidelity to the company in procuring these convictions, Mr. David's death at the hands of an assassin was the proximate and efficient cause of the complete eradication of the menace and loss. Hence, in a very real sense, Mr. David's death resulted in a direct pecuniary benefit to the Missouri Pacific. The question is: Shall the Missouri Pacific Railway Company or Sophia David pay for this extreme service?

Respectfully submitted,

Edmund H. McVey,
Samuel R. Freet,
Lester G. Seacat,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 365.—October Term, 1931.

Missouri Pacific Railroad Company, Petitioner, *vs.* Sophia David, Administratrix of the Estate of James Lee David, Deceased. } On Writ of Certiorari to the Supreme Court of the State of Missouri.

[February 15, 1932.]

Mr. Justice McReynolds delivered the opinion of the Court.

While employed by petitioner, Railroad Company, and charged with the duty of protecting its trains against robbers, James Lee David was murdered in the night of May 17th, 1923. His administratrix sued for damages under the Federal Employers' Liability Act in the Circuit Court, Jackson County, Missouri, and obtained a favorable verdict. Judgment thereon was affirmed by the Supreme Court. The cause is here upon writ of certiorari.

Often during the months prior to April, 1923, the petitioner suffered losses through depredations by organized bands of robbers upon freight trains in and near Kansas City, Missouri. It determined to make special efforts to frustrate further attacks by the culprits and, if possible, cause their apprehension. To this end, on April 1st, 1923, it employed David to act as a "train rider" or guard for its cars. He had had experience in similar undertakings. Also, he was carefully advised concerning the probable danger. He was told that the robbers were desperate men who "would shoot him just as quick as they saw him." He carried a pistol and sawed-off shot gun "for the purpose of defending himself and the company's property." When asked "Whether you will fight these fellows or not?", he replied "I will fight them until I die."

Subsequent to David's employment, in order to strengthen its efforts towards frustration and to secure arrests, petitioner em-

ployed McCarthy, known to be associated with one of the criminal bands, who agreed, when possible, to furnish advance information of intended depredations, aid in locating stolen goods, etc. "His instructions were that he was to get us word before the robbery was committed [through the telephone], if he could, if not, to give us information as soon as he could after the robbery had been committed."

The theory upon which respondent recovered below is that while acting for petitioner McCarthy knew of a plan to rob the train to which David was assigned on May 17th and in violation of his duty negligently failed to notify his superior officer. That because of such negligence David received no notice of the plan although he had the right to rely upon being supplied with such information in order to prepare to cope with the brigands on equal terms. As a consequence, he failed to take the necessary precautions and exposed himself to being shot.

The established rule is that in proceedings under the Federal Employers' Liability Act assumption of the risk is an adequate defense. *Seaboard Air Line Railway* v. *Horton,* 233 U. S. 492; *Boldt* v. *Pennsylvania Railroad Co.,* 245 U. S. 441, 445; *Chesapeake & Ohio Ry. Co.* v. *Nixon,* 271 U. S. 218; *St. Louis-San Francisco Ry. Co.* v. *Mills,* 271 U. S. 344; *Atlantic Coast Line R. R. Co.* v. *Southwell,* 275 U. S. 64; *Toledo, St. Louis & Western R. R. Co.* v. *Allen,* 276 U. S. 165.

Under the circumstances disclosed by the record, clearly, we think, David assumed the risk of the default which, it is said, resulted in his death. He understood the nature of his employment and the incident dangers. He well knew that he was subjecting himself to murderous attacks by desperadoes. There was no promise to give him special warning or protection. Even if he had knowledge of McCarthy's employment (and this is far from certain), he must have appreciated the utter unreliability of the man and the probable inability of the master to obtain timely information through such a medium. He could not properly expect to be protected against criminals whom he was employed to fight through treachery by one of their associates. The common employer, notwithstanding efforts to obtain warning, actually knew nothing of the criminal plan. If we accept respondent's view of

the facts, David assumed the risk of the negligent action of which complaint is now made.

We need not consider any other point advanced in behalf of the petitioner.

The judgment of the court below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.